LCRO 110/2017

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	**EB** Applicant
AND	**APPLICATION FOR REVIEW OF A PROSECUTORIAL DECISION**

DECISION

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

Introduction

[1] In a decision dated 21 February 2017, [Area] Standards Committee X determined that the conduct of EB, a lawyer practising in [City], was such that it should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal), pursuant to s 152(2)(a) of the Lawyers and Conveyancers Act 2006 (the Act).

[2] This followed a complaint that had been made against Mr EB by his former client, Ms AD.

[3] Mr EB has applied to review the Committee's decision.

Background

[4] Ms AD lives in New Zealand. Her cousin, Mrs A, lived in [Country A].

[5] Mrs A held shares in New Zealand and Australian companies, on Ms AD's behalf. Mrs A granted Ms AD power of attorney, and this allowed Ms AD to administer the shares and receive dividend payments. On Mrs A's death in [Country A], the power of attorney in favour of Ms AD lapsed.

[6] Ms AD approached Mr EB on 26 August 2009 and outlined the situation to him. He agreed to act for her.

[7] Mr EB recommended that Ms AD should set up a trust, with the trustees owning the shares and Ms AD as the beneficiary. Dividends could be deposited into his trust account.

[8] Mr EB estimated that his fees for setting up the trust would be $1,500, including GST and disbursements.

[9] Ms AD had difficulties getting in touch with Mr EB. She encountered problems finding suitable trustees. The process of setting up the trust was not straightforward.

[10] In August 2010, Mr EB wrote to Ms AD and attached an invoice totalling $4,281.75 (the August 2010 invoice). It was his first invoice to her, and it concerned the work he had done since August 2009.

[11] On 20 August 2010, Ms AD challenged the invoice and its attached terms for payment.

[12] On 10 September 2010, Mr EB responded with an account statement showing that he had deducted from the August 2010 invoice, share dividends received by him in the sum of $584.47, leaving a balance owing by Ms AD towards fees of $3,693.34.

[13] Although unhappy about doing so, Ms AD paid the balance by monthly instalments of $750. Mr EB also applied dividend payments he received between September 2010 and June 2011 in reduction of the August 2010 invoice.

[14] In an email to Mr EB dated 5 July 2011, Ms AD indicated that she wished to terminate his retainer. She told Mr EB to "close [her] file" and that she would collect the file from his office. Ms AD also asked whether any fees remained outstanding.

[15] Mr EB responded on the same day, and indicated that no fees were outstanding. He also set out matters that still needed to be attended to and emphasised that probate in [Country A] of Mrs A's estate was very important.

[16] On 7 July 2011, Ms AD replied to Mr EB and said that she would "reconsider [her] decisions".

[17] Ms AD then dealt directly with shares registries and instructed them not to pay further dividends to Mr EB, and to pay them to her. This they did from about October 2011.

[18] Ms AD did not collect her file from Mr EB.

[19] On 9 March 2016, almost five years after their last contact in July 2011, Mr EB wrote to Ms AD and attached an invoice for $1,595.63 for "sundry attendances since 2010" (the March 2016 invoice). The invoice referred to "receiving dividends from time to time", and to "discussions with [Bank A]" and "extensive emails".

[20] In his covering letter Mr EB told Ms AD that he had paid this invoice from dividends he had received, and that there was a balance owing to her of $932.79. He indicated that he had also written to her on several occasions in the intervening five years.

[21] Ms AD had not received any of that correspondence. She had last heard from Mr EB on 5 July 2011.

[22] Ms AD wrote to Mr EB on three occasions after receiving his 9 March 2016 letter and attached March 2016 invoice, disputing the invoice and requesting payment of the full amount of dividends he had received on her behalf ($2,528.42).

[23] In December 2016, Mr EB refunded that amount to Ms AD. He did not include any interest earned on the dividend payments.

[24] Total fees charged by Mr EB, including GST and modest disbursements, were $5,877.38. These comprised his August 2010 invoice for $4,281.75 and his March 2016 invoice for $1,595.63. In relation to the August 2010 invoice Ms AD paid a total $5,091.93, made up of dividend contributions and monthly payments of $750. This was an overpayment of approximately $800.

[25] It would appear from Mr EB's trust account records that total dividends received by him amounted to $3,112.89.

Complaint

[26] On 4 November 2016, Ms AD lodged a complaint against Mr EB with the New Zealand Law Society Lawyers Complaints Service (the Complaints Service).

[27] A summary of Ms AD's complaint is that:

(a) she approached Mr EB in 2009 to discuss the possibility of setting up a family trust, and Mr EB provided a verbal estimate of $1,500, all inclusive, to accomplish this;

(b) Mr EB did not provide any terms of engagement;

(c) Mr EB unexpectedly presented Ms AD with the August 2010 invoice, in the sum of $4,281.75;

(d) she paid those fees by regular instalments of $750 between August 2010 and April 2011;

(e) in July 2011, Ms AD asked Mr EB "to do no work for [her] from 2011", and to close her file. These were her last instructions to Mr EB;

(f) at that time, there were no outstanding fees;

(g) Ms AD then arranged for dividend payments to be made directly to her, which occurred. She resolved the matter in full, herself, within a relatively short time;

(h) she next heard from Mr EB in March 2016 and learned that he was holding $2,528.42 on her behalf. Ms AD presumes that these were funds received by Mr EB before she arranged for dividend payments to be made directly to her;

(i) the March 2016 invoice related to work she had not instructed Mr EB to carry out;

(j) Mr EB did not respond to Ms AD's correspondence to him on 9 March, 29 May and 17 August asking for an explanation for his March 2016 invoice and for the payment of the full amount of the dividends he had received on her behalf;

(k) without her knowledge, Mr EB has been holding $2,528.42 of her money for over five years; and

(l) he has not accounted to her for interest earned on the money.

Response

[28] Mr EB responded to the complaint in a letter to the Complaints Service dated 20 December 2016. He submitted that:

(a) Ms AD had never uplifted her file despite saying she would do so on 5 July 2011;

(b) after receiving advice from Mr EB on 5 July, Ms AD said she would "reconsider [her] decisions";

(c) Mr EB carried out further work on Ms AD's behalf, which included writing to her on three occasions;

(d) since September 2010 he has received fifteen dividend cheques on Ms AD's behalf, made payable to her trustee, Mrs A;

(e) there were some difficulties associated with the instructions received from Ms AD. These related to "past issues" concerning her. Matters required careful handling; and

(f) although his March 2016 invoice was otherwise justified, Mr EB decided to refund those fees to Ms AD. This includes "accrued interest" on the shares dividends.

Further comment from Ms AD

[29] Commenting on Mr EB's response, Ms AD responded in a letter dated 10 January 2017:

(a) acknowledged receiving $2,528.42 from Mr EB;

(b) said that she had not received any interest in relation to the dividends collected and held by Mr EB;

(c) had never received details of the funds Mr EB had been holding, and was unaware that he was doing so;

(d) said she had been apprehensive about uplifting her file from Mr EB lest that incur further costs; and

(e) noted that her core complaint was that Mr EB had been holding money on her behalf after she had instructed him to cease work.

Notice of Hearing

[30] The Standards Committee resolved to set the matter down for a hearing on the papers. A Notice of Hearing was prepared, dated 27 February 2017, identifying the following issues:

> The issues raised by the alleged conduct itself, including:
>
> (a) Did Mr EB fail to follow Ms AD's instructions to close her file in 2011 and more recently pay funds held on her behalf to her nominated account?
>
> (b) Did Mr EB fail to account for trust money or ensure that funds held earned interest?
>
> (c) Did Mr EB complete further work for Ms AD without instructions and charge fees for that work?

[31] The Notice of Hearing included "the possibility of charges being laid with the New Zealand Lawyers and Conveyancers Disciplinary Tribunal".

Submissions:

Ms AD

[32] Ms AD's submissions, sent by email dated 8 March 2017, addressing the issues set out in the Notice of Hearing largely confirm her complaint and her comments on Mr EB's response to that complaint. Additional matters included:

(a) her comment in her email to Mr EB dated 7 July 2011 that she would "reconsider [her] decisions" was a "general comment" that "did not change [her] instructions [in that email] to close her file";

(b) Ms AD did not subsequently give Mr EB any instructions to act on her behalf; and

(c) after July 2011 Ms AD made all the necessary arrangements with the relevant institutions and there would have been no need for Mr EB to speak to anyone at the [Bank A] during this time.

Mr EB

[33] Mr EB's submissions addressing the Notice of Hearing were set out in his letter to the Complaints Service dated 16 March 2017. Mr EB submits that:

(a) when she first instructed him, Ms AD had concerns about being "exposed" as she was receiving a domestic purposes benefit;

(b) her assets were held under a bare trust by Mrs A in [Country A], with Ms AD being the beneficiary. The value of the shares and stock was approximately $65,000;

(c) considerable work was done on Ms AD's behalf. Obtaining probate of Mrs A's estate in [Country A] was a pre-requisite, but Ms AD did not pursue that;

(d) potential issues of fraud and perjury surfaced;

(e) dividend cheques were sent to Mr EB with Ms AD's authority. She also authorised the application of those funds towards legal fees;

(f) although on 5 July 2011 Ms AD instructed Mr EB to close his file and that she would collect it, she has never done so;

(g) very little interest was earned on the modest dividend cheques received;

(h) Ms AD's 5 July 2011 email did not state that no further work should be carried out. To "tidy up" matters "it was inevitable that enquiries had to continue to be carried out. In addition, dividend cheques continued to be received"; and

(i) in carrying out that work Mr EB was entitled to be paid a reasonable fee.

The Standards Committee decision

[34] The Standards Committee delivered its decision on 28 April 2017.

[35] The Committee determined that:[1]

[1] Standards Committee determination, 28 April 2017 at [1].

> The matter and any and all issues involved in the matter, should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal pursuant to section 152(2)(a) of the Lawyers and Conveyancers Act 2006.

Application for review

[36] Mr EB filed his application for review on 8 June 2017. He submitted that:

(a) the referral to the Tribunal is manifestly unreasonable;

(b) the complaint lacked merit. Ms AD acted without regard to her obligation to facilitate probate;

(c) Ms AD failed to respond to correspondence or follow sound legal advice;

(d) Mr EB was obliged to carry out legal work relating to the administration of a deceased estate despite Ms AD's failure to communicate with him over a period of years;

(e) Mr EB "made good" by refunding fees when not obliged to do so;

(f) no loss was suffered by Ms AD who acted out of self-interest throughout; and

(g) his failure to repeat his earlier follow-up on Ms AD "is the only matter for which [he] can be criticised, which is unsatisfactory conduct at the very low end".

Submissions in response from the Standards Committee

[37] On behalf of the Committee, counsel Mr GR filed submissions on 22 June 2017 opposing Mr EB's application for review.

[38] Mr GR notes that a charge has been filed with the Tribunal on 14 June 2017, but that process will await the outcome of the application for review.

[39] In opposing the application for review, Mr GR submits that:

(a) the charge is in the alternative: misconduct, unsatisfactory conduct or negligence or incompetence;

(b) Mr EB:

(i) failed to account to Ms AD for trust money;

(ii) failed in his duty to hold and pay Ms AD's money in accordance with s 110(1)(b) of the Act;

(iii) charged a fee, and paid that fee by deduction from trust money:

- In the absence of a contract of retainer;
- Without any instructions to perform any work;
- Without authority to deduct trust money; and

(iv) misled and deceived the complainant.

(c) Mr EB has taken no issue with the procedures followed by the Committee;

(d) at the very least "the fact that the practitioner remained in possession of [Ms AD's] money for a period of about four years and eight months without accounting to her, is conduct warranting consideration by [the Tribunal]";

(e) the deception involved Mr EB, in the March 2016 invoice, purporting attendances to justify a fee when he had no authority to act and no instructions;

(f) citing *Zhao v LCRO*, the High Court held that "a critical question for the LCRO is whether the degree of gravity of the matter should justify the Standards Committee exercising the power to refer to the Tribunal";[2]

(g) if proven, Mr EB's conduct is capable of constituting misconduct; and

(h) in blaming Ms AD, Mr EB has aggravated his position.

Nature and scope of review

[40] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[3]

---

[2] *Zhao v Legal Complaints Review Officer* [2016] NZHC 2622 at [25].
[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> … 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.

[41] More recently, the High Court has described a review by this Office in the following way:[4]

> 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.

[42] 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 the available material afresh, including the Committee's decision; and

(b) provide an independent opinion based on those materials.

Statutory delegation and hearing in person

[43] As the Officer with responsibility for deciding this application for review, I appointed Mr Robert Hesketh as my statutory delegate to assist me in that task.[5] As part of that delegation, on 9 October 2017 at Auckland, Mr Hesketh conducted a hearing at which Mr EB appeared in person together with his counsel, Mr CW. Counsel for the Standards Committee, Mr GR, had earlier indicated that the Committee relied upon its written submissions, and did not intend to appear by counsel.

---

[4] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[5] Lawyers and Conveyancers Act 2006, sch 3, cl 6.

[44] The process by which a Review Officer may delegate functions and powers to a duly appointed delegate was explained by Mr Hesketh. Both Mr EB and Mr CW indicated that they understood that process and took no issue with it.

[45] At the conclusion of the hearing, Mr CW indicated that there were some additional matters that he wished to address on Mr EB's behalf in written submissions. Leave was granted for him to do so, and a right of reply was extended to Mr GR on behalf of the Standards Committee.

[46] Those submissions have been received by this Office.

[47] Mr Hesketh has reported to me about that hearing and we have conferred about the complaint, the application for review and my decision. There are no additional issues or questions in my mind that necessitate any further submissions from either party.

Statutory framework for the prosecution decision

[48] The Act provides for two categories of conduct which may attract disciplinary sanction — misconduct and unsatisfactory conduct.[6] The former is the more serious and can lead ultimately to a practitioner being struck off by the Tribunal.[7]

[49] Standards Committees may only make findings about the lesser category of unsatisfactory conduct.[8] When confronted with a complaint, including an own-motion investigation,[9] in which the spectre of misconduct is present a Standards Committee may direct it to be considered by the Tribunal,[10] and thereafter the Standards Committee must frame and lay any appropriate charge with the Tribunal and serve them on the practitioner and any complainant.[11]

[50] Significantly, when directing a complaint to be considered by the Tribunal, a Standards Committee is not obliged to provide reasons. This is evident from the language of s 158 of the Act, which requires reasons to be given only when a Standards Committee makes a finding of unsatisfactory conduct or determines to take no further action.

---

[6] Sections 7 and 12.
[7] Section 244.
[8] Section 152(2)(b).
[9] Section 130(c).
[10] Section 152(2)(a).
[11] Section 154.

[51] It is generally a fundamental tenet of natural justice that decision-makers provide reasons. At first blush it may seem inconsistent with that principle that a Committee with a statutory power of decision-making is not obliged to provide reasons for a decision it makes.

[52] In *Orlov v New Zealand Law Society* the Court of Appeal gave careful consideration to the question as to whether a Standards Committee was required to provide reasons for its decision to refer a matter to the Tribunal, and concluded that "it is clear from s 158 that a Standards Committee is not required to give reasons for a decision made under s 152(2)(a) to refer a matter to the Tribunal."[12] Further, the Court noted that if Parliament had intended that a Committee be required to provide reasons for its decision to refer, then it would have expressly said so.[13]

[53] It is also important to note that in *Orlov* the Court of Appeal held that there is no threshold test to meet before a Standards Committee makes a prosecution decision.[14]

[54] Moreover, because Standards Committees may not make findings that particular behaviour is misconduct, the decision to prosecute is not a merits-based decision. In effect when directing the prosecution of a practitioner a Standards Committee is saying, 'this behaviour may constitute misconduct; if so, only the Tribunal may determine that question'.

[55] Furthermore, the Tribunal may make that determination only after charges have been laid and a hearing conducted in that forum. The hearing will include parties giving evidence and being cross-examined — indeed, a traditional first-instance hearing procedure. It is only at the conclusion of that process that a merits-based decision may be made by the Tribunal.

[56] Nevertheless, whilst a Standards Committee is not required to provide reasons for its decision to refer a matter for prosecution before the Tribunal, there is an express right of review conferred by the Act.[15]

---

[12] *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562 at [98].
[13] At [99].
[14] At [53].
[15] Section 193.

Role of the LCRO on reviewing a prosecution decision

[57] In *Orlov* the Court of Appeal commented "there is now oversight of the referral decision by the independent LCRO".[16]

[58] More recently the High Court was asked to review a decision of this Office in which it had dismissed an application for review of a Standards Committee's decision to prosecute a practitioner. Fogarty J held the following: [17]

> The purpose of a review by the LCRO is to form a judgment as to the appropriateness of the charge laid in the prosecutorial exercise of discretion by the Standards Committee. It is a simple as that. ... I agree ... that "a review by the LCRO (should be) 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. I agree also there is room in that review for the LCRO to identify errors of fact.

[59] Fogarty J also observed that "a critical question for the LCRO is whether the degree of gravity of the matter should justify the Standards Committee exercising the power to refer [conduct] to the Tribunal".[18]

Analysis

Counsel's submissions

Letter and terms of engagement issues

[60] In his written submissions filed on 24 October 2017, Mr CW provided a copy of Mr EB's letter and terms of engagement, said to have been provided to Ms AD at the beginning of the retainer on 12 August 2009.

[61] Amongst the terms of engagement is cl 6.6, a provision allowing for Mr EB to deduct fees from funds held. The terms also contain other "extensive" client information.

[62] Mr CW submits that Mr EB's comprehensive letter and terms of engagement provide a complete answer to the Committee's charge that he received funds, failed to account for them, charged fees and deducted them from those funds.

---

[16] *Orlov v New Zealand Law Society*, above n 12, at [54](d).
[17] *Zhao v Legal Complaints Review Officer,* above n 2, at [23].
[18] At [25].

[63] In reply Mr GR on behalf of the Standards Committee noted that the letter and terms of engagement were not before the Committee when it considered Mr EB's conduct, but that it had been open to Mr EB to provide it as part of his response to Ms AD's complaint.

Procedural unfairness

[64] Mr CW criticises several aspects of the Committee's inquiry process, and submits that the combined effect is that there has been procedural unfairness which taints the decision to refer Mr EB to the Tribunal.

[65] Mr CW submits that the Committee's Notice of Hearing did not include reference to the particulars that form part of the charge subsequently laid, the letter of engagement and application of dividend payments towards fees. He submits that the Committee ought to have called, at the very least, for a copy of Mr EB's letter and terms of engagement, as such would have satisfied it that there was a proper contract of retainer, which included an authority to deduct funds.

[66] Mr CW further submitted that the Committee did not call for Mr EB's file, did not offer mediation and did not ask Mr EB to appear before it in person. The result is "a straightforward matter has been over-blown".

[67] Mr CW submits that the combination of these omissions amounts to a breach of the Committee's obligation to observe the rules of natural justice. Particular emphasis is put on the charging issues arising out of the letter and terms of engagement. Mr CW submits that the Committee provided inadequate notice to Mr EB of its areas of concern, and he responded as best he could to what had been set out in the Notice of Hearing.

[68] Mr GR argues, in submissions dated 6 November 2017, that although the Committee's Notice of Hearing did not use language which "[absolutely] aligned" with the charge it ultimately laid, there was a close correspondence between the words used and that Mr EB was, during the Committee's investigation, sufficiently put on notice of the issues of concern it had.

[69] Mr GR rejects the suggestion that the obligation was the Committee's to call for either Mr EB's file, or at the very least, his letter and terms of engagement. Mr GR submits that this "has the effect of putting on to the [Committee] the responsibility for anticipating an answer to the complaint".

[70] Mr GR submits that, rather, it was Mr EB's task to marshal the material necessary to respond to Mr AD's complaint. He notes that Ms AD's complaint was lengthy and detailed, whereas Mr EB's initial response was brief and did not respond to the allegations that had been made, and his second response omitted any reference to terms of engagement.

[71] Further, Mr GR submits that the references in the Notice of Hearing to completing work without instructions and failing to account for trust monies were clear indications of the Committee's concerns.

[72] To the criticism that the charge laid includes particulars that were not put to Mr EB in the Committee's Notice of Hearing, Mr GR submits that the charge was laid after the Committee's decision to refer a practitioner to the Tribunal, and that they were framed by counsel instructed. He submits that the proper place to challenge the charge is the Tribunal.

[73] Finally, Mr GR submits that the failure to direct mediation or to require Mr EB to appear in person, are not illustrations of procedural errors.

Other matters

[74] My CW is critical that the Committee has focussed on narrow conduct issues, and overlooked the more significant issue that Mr EB provided competent legal advice to a challenging client who presented with difficult legal issues engaging different jurisdictions.

[75] Mr CW went so far as to submit that its approach was "manifestly wrong and unfair" and further that it was "manifestly unreasonable".

[76] Mr CW also criticised Ms AD's delay and motivation for making her complaint.

[77] Mr CW submits that when all of the circumstances are properly weighed, Mr EB's conduct cannot properly be characterised as misconduct.

[78] Mr GR position is that the prosecution involves "a potentially serious issue" involving allegation that Mr EB "retained trust money without authority and engaged in unauthorised dealing with trust money".

Discussion

Letter and terms of engagement issues

[79] In her affidavit, dated 14 June 2017, in support of the charge, Ms AD deposed that "Mr EB did not provide me with any written terms of engagement or any other written explanation of his services at the time of [my] discussions [in August 2009]". Ms AD refers to receiving an estimate from Mr EB at that meeting, of approximately $1,500.

[80] This is inconsistent with the submissions advanced on Mr EB's behalf by Mr CW after the hearing, in which a copy of a letter and terms of engagement was attached. The letter is dated 12 August 2009 and is addressed to Ms AD at what was presumably the street address she provided to Mr EB.

[81] The letter of engagement refers to the attached terms, and to "an hourly rate set out in [cl] 6" of those terms. However, cl 6 does not identify an hourly rate.

[82] The letter of engagement also has provision for Ms AD's signature as an indication of her acceptance of Mr EB's terms of engagement. The copy provided by Mr CW has not been signed by Ms AD.

[83] In August 2010, approximately 12 months after the retainer began, Mr EB forwarded Ms AD his first invoice. That invoice was for a total sum of $4,281.75. There is no reference to time spent or an hourly rate charged. The invoice was forwarded to Ms AD at a post office box number, rather than to her street address.

[84] It bears noting that Ms AD immediately challenged the invoice in a lengthy email to Mr EB dated 20 August 2010. That response is annexed as an exhibit to Ms AD's affidavit dated 14 June 2017. Of significance, Ms AD:

(a) queried Mr EB's charge out rate; and

(b) asked what was happening to her dividend funds.

[85] When challenged by Ms AD about the August 2010 invoice, Mr EB provided her with a statement of account in September 2010 showing that he had applied $584.47 of dividend payments in reduction of that invoice, leaving a balance outstanding of $3,693.34.

[86] Mr EB did not inform Ms AD that he had made the deductions based on his terms of engagement. He did not inform her what his hourly charge-out rate was.

[87] In the light of her lengthy challenge to the August 2010 invoice, these are surprising omissions.

[88] Nevertheless, Mr EB and Ms AD reached agreement as to the payment of the August 2010 invoice, and she did so by regular instalments of $750, and a final payment of $694. This gives a total of $3,694 — 66 cents more than the balance she owed under the August 2010 invoice.

[89] However, Mr EB continued to apply dividend payments towards the August 2010 invoice. The combination of Ms AD's instalments and the dividend contributions produced an overpayment of the August 2010 invoice. In total the sum of $5,091.93 was paid.

[90] This is an overpayment of $810.18, for which no explanation has been offered, nor any accounting provided.

[91] It should have been tolerably clear to Mr EB from Ms AD's email to him on 20 August that she had not read and indeed may not have received his letter and terms of engagement dated 12 August 2009.

[92] It should also have been clear to Mr EB that Ms AD had not authorised Mr EB to apply dividends towards the unpaid August 2010 invoice after September of that year, as her repayments cleared that debt. He had no need to also apply dividend payments towards that invoice.

[93] There is a degree of uncertainty about whether Ms AD received the letter and terms of engagement. Mr EB may believe that it was sent to her, when administratively it had not been. Ms AD is clear that terms of engagement were never provided.

[94] In my view, there is real doubt about the scope and terms of Mr EB's retainer beyond August 2010, if not before, and those are matters best left to the Tribunal to deal with based on evidence that can be subjected to greater scrutiny than is available to this Office.

Procedural unfairness

[95] The core submission advanced under this head by Mr CW is that the Committee ought to have called for Mr EB's file which included his letter and terms of engagement or, at the very least, that document. Had it done so, the Committee's concerns about the nature and scope of the retainer would have been addressed and the matter disposed of other than by a referral to the Tribunal.

[96] A useful place to start when considering this criticism, is Ms AD's complaint to the Complaints Service.

[97] On page two of her complaint, dated 4 November 2016, Ms AD noted that she wrote to Mr EB on 17 August 2010 requesting "a copy of and 'Letter of Engagement', if any, and/or signed by me (which I never did as no such document has been offered to me)".

[98] On page three of her complaint, Ms AD describes her recollection of her first meeting with Mr EB in August 2009. She said that she did "not recall being advised of Mr EB's terms of engagement", including charge out rates and other costs.

[99] Ms AD was also adamant that she provided no further instructions to Mr EB after July 2011, but received an invoice for work apparently done by him up until March 2016, the amount of which was met by deduction from funds he held, those being the dividend payments he was receiving on her behalf.

[100] In my view, the detail of Ms AD's complaint provides the complete answer to Mr CW's submission that the Committee ought to have requested, at the very least, a copy of the letter and terms of engagement.

[101] Ms AD's complaint unequivocally states that she did not receive one. There could be no clearer indication to a lawyer facing a complaint, that one of the key grounds of complaint concerned a lack of terms of engagement.

[102] It fell to Mr EB to respond to that issue complaint at the outset. It was not the Committee's function to do any more than notify him of the complaint and obtain his response, and from there inquire into the conduct issues that arose.

[103] I do not accept Mr CW's submission that the Committee's failure to obtain either Mr EB's file or the letter and terms of engagement, represents a procedural error

on its part. Responsibility for answering a complaint where that issue has been squarely raised, fell to Mr EB.

[104] A further point made by Mr CW is that there was a disconnect between the matters of inquiry set out in the Committee's Notice of Hearing, and the particulars of the charge that was laid and filed by the Committee after it made its decision to refer Mr EB's conduct to the Tribunal.

[105] A charge is (or charges are) generally framed by counsel instructed by the Committee. Counsel has all of the information that was before the Committee. Importantly, the practitioner complained about has also been provided with all the information upon which the Committee based its decision to prosecute, and has been provided with an opportunity to respond to it before the Committee makes its decision.

[106] A Notice of Hearing is not a charging document. It does not purport to be an exhaustive list of potential conduct issues. The Notice of Hearing is designed to give the parties fair notice of the issues of concern that are to be addressed. It is a map rather than the destination itself.

[107] It bears setting out again the issues identified in the Notice of Hearing:

> **1. The issues raised by the alleged conduct itself, including:**
>
> (a) Did Mr EB fail to follow Ms AD's instructions to close her file in 2011 and more recently pay funds held on her behalf to her nominated account?
>
> (b) Did Mr EB fail to account for trust money or ensure that funds held earned interest?
>
> (c) Did Mr EB complete further work for Ms AD without instructions and charge fees for that work?
>
> [Emphasis added].

[108] The "alleged conduct" is plainly a reference to the matters raised by Ms AD in her complaint. This clearly put Mr EB on notice that the Committee would, for example, be considering the scope and terms of his retainer. Any response ought to have addressed that by providing the letter and terms of engagement.

[109] Issues (a)–(c) make it sufficiently clear also that issues about the existence, scope and terms of any retainer were to be addressed by the Committee.

[110] In my view the charge reflects that inquiry. It does so with greater particularity than is provided in the Notice of Hearing, which is as one would expect. But it does so

based on the same set of facts as were in the Committee's and, significantly, Mr EB's possession when there was opportunity for him to respond to the complaint.

Other matters

[111] An aspect of the Committee's charge is that for a period of four years and eight months after the retainer was terminated in July 2011, Mr EB, having received and retained client funds (the dividend cheques), did not during that period account to Ms AD for those funds.

[112] Mr EB received dividend cheques between September 2010 and approximately 3 October 2011. At about that time Ms AD arranged for dividend cheques to be sent to her directly. She has said that this in fact occurred. Mr EB's trust account records appear to confirm this, because nothing was recorded as having been received by him after 3 October 2011.

[113] In his letter to Ms AD accompanying his March 2016 invoice, Mr EB said "[since] September 2010 we have received dividends [for Ms AD] [and] sent [Ms AD] letters of advice from time to time as well as extensive emails". This gives an impression of attentiveness over several years, as well as having received dividend cheques during this time.

[114] As against that, in responding to the complaint in his letter to the Complaints Service dated 20 December 2016, Mr EB said that since September 2010 he has sent "one lengthy email to Ms AD, a half-page email to her and a short letter to her", as well has having received "15 dividend cheques".

[115] This is not the same as "letters of advice from time to time as well as extensive emails", which is how Mr EB described it in his covering letter to the March 2016 invoice.

[116] At the hearing before Mr Hesketh, through Mr CW, Mr EB produced copies of seven letters that he said were sent by him to Ms AD between 16 March 2010 and 30 November 2010. These were not copies taken from Mr EB's physical file, they were printed by Mr EB from his computer system on 9 October 2017. Because of the automatic updating of documents by his word processing software, each letter bears the date 9 October 2017.

[117] Of those seven letters, four were written between 10 September 2010 and 30 November 2010.

[118] Mr EB has not produced any of the correspondence he apparently sent, whether by letter or email, to Ms AD between July 2011 and March 2016, when he sent his second and final invoice.

[119] The difference in Mr EB's two descriptions of what he apparently sent to Ms AD are not insignificant and raise matters which in my view are best assessed by the Tribunal with the benefit of evidence that can be tested.

[120] It is not disputed that Ms AD did not provide Mr EB with any instructions after her email exchange with him in July 2011. I do not regard her comment that she would "reconsider her decisions" as amounting to a continuation of the retainer, as has been suggested by Mr EB. In my view Ms AD was responding to Mr EB's advice about the approach to take with Mrs A's estate, and no more.

[121] Nevertheless, as Mr EB's March 2016 letter and invoice indicates, he continued to treat the retainer as on foot and invoiced Ms AD for time spent in the over four-year period after their last communication. In the circumstances, it is difficult to see how that approach could be justified.

[122] A Standards Committee's power to refer a practitioner to the Tribunal derives from s 152(2) of the Act. The Standards Committee may make a referral if it considers that concerns have arisen which, if proven, could lead to a misconduct finding. All that a Standards Committee needs to be satisfied of is whether the conduct in question, if proven, is capable of constituting misconduct. It does not fall to the Standards Committee to determine whether the conduct in question is misconduct.

[123] The issue I am required to consider is whether there is any proper basis for interfering with the Committee's decision to refer Mr EB's conduct to the Tribunal for prosecution.

[124] As Fogarty J held in *Zhao*, I must robustly come to my own view of the fairness of the substance and process of the Committee's prosecution decision.[19]

[125] In setting out significant background, Mr CW submits that Mr EB's conduct cannot amount to misconduct.

[126] It is not for a Standards Committee or this Office to make findings of misconduct. That is the exclusive domain of the Tribunal. At the most, a Standards Committee and this Office are able say that there are conduct issues that could — not

[19] *Zhao v Legal Complaints Review Officer,* above n 2, at [23].

would — amount to misconduct if the Committee's evidence crosses the threshold required before the Tribunal.

[127] In my view the lack of any clarity around whether, for some six to seven years, Mr EB had authority to deduct his fees from funds held, as he has done, raises issues about his fiduciary obligations.

[128] That issue alone, in my view, requires the closer evidential scrutiny to which the Tribunal may subject it.

[129] Mr EB submits that only one aspect of his conduct requires a disciplinary response, and that at the lower end of the scale of unsatisfactory conduct. In that regard he refers to his failure to follow-up with Ms AD between July 2011 when Ms AD said she was reconsidering her position, and March 2016 when Mr EB sent her his second invoice.

[130] Mr EB maintains that the other conduct allegations arise because of intransigence and self-interest on Ms AD's behalf. Mr CW submits that none of Ms AD's funds have gone missing; the trust account records provide full accounting for them, and moreover Mr EB has fully refunded the fees that he charged.

[131] I have given all of the material on the Standards Committee file, careful consideration. This includes examining the processes it adopted when making the decision to prosecute. Nothing about those processes raise any cause for concern. Mr EB was given every opportunity to put any matters he wished before the Standards Committee.

[132] I have also carefully considered the documentation filed in support of the charge, the material provided in support of the review, as well as the oral submissions advanced by Mr EB at the review hearing itself.

[133] In addition, Mr EB provided this Office with his complete file. I have had regard to that file when considering this matter. The file is large although contained within one folder. Significantly, and consistent with what has been revealed during the Committee's inquiry and this review, there does not appear to have been any communication between Mr EB and Ms AD between July 2011 and March 2016, when he sent his second invoice.

[134] The above matters which, in my view, are proper ones for the Tribunal to consider. They require careful assessment of the evidence, and matching that

evidence against the legislative standards of misconduct, negligence or incompetence and unsatisfactory conduct to see which that has been engaged by the conduct. Only the Tribunal may carry out that function and determine the gravity of that conduct.

[135] I see no reason to interfere with the decision of the Standards Committee to lay a charge before the Lawyers and Conveyancers Disciplinary Tribunal.

Decision

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

DATED this 20th day of November 2017

_____

R Maidment
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 EB as the Applicant
Mr CW as the Applicant's counsel
Ms AD as an interested party
[City] Standards Committee X
Mr GR as Auckland Standards Committee 5's counsel
The New Zealand Law Society