LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 220

Ref: LCRO 140/2020

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	**AB** Applicant
AND	**RP** Respondent

DECISION

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

Introduction

[1] Mr AB has applied to review a determination by the [City] Standards Committee [X] (the Committee) dated 18 May 2020, in which the Committee made findings of unsatisfactory conduct against him, fined him and ordered him to pay costs.

Background

[2] During 2018 Mr AB was a partner in the law firm GHJ, which is located in south east City A. He has recently retired from legal practice.

[3] Mr and Mrs RP were clients of GHJ in 2012, when they sold their home. The legal work involved acting on that sale, which included securing the discharge of a mortgage.

[4] At the time of the 2012 legal work, the lawyer in GHJ with responsibility for the matter provided Mr and Mrs RP with terms of engagement.

[5] A company in which Mr and Mrs RP were directors and shareholders, owned a piece of rural land. The RPs had moved there after they sold their home in 2012.

[6] In 2018 Mr and Mrs RP decided to transfer ownership of the property into their own names, and at the same time refinance and restructure loans secured over the property.

[7] By late October 2018 the RPs had arranged a favourable interest rate from the Bank A for their proposed refinancing, but the rate was "locked" and expired on 30 November 2018.

[8] In early November 2018 Mr RP spoke to Mr AB about the legal work necessary to complete the transfer and refinancing. Mr RP said that the starting point was for the RPs to obtain a valuation of the property.

[9] Mr RP and Mr AB discussed legal fees, and Mr AB gave an estimate of $1,500 to $1,700 plus GST and disbursements.[1]

[10] By 19 November 2018 the RPs had obtained a valuation, and on that date they forwarded it to Mr AB. On that date also the Bank A forwarded the loan documents to Mr AB.

[11] On 20 November 2018 Mr RP spoke to Mr AB about the transaction.

[12] On 26 November 2018 the Bank A queried with Mr RP why he had not signed the transaction documents, saying that Mr AB had indicated that the sale and purchase agreement had been prepared.

[13] Mr RP contacted GHJ and spoke to Mr F, a solicitor in GHJ under Mr AB's supervision, who was managing the transaction. Mr F said that he was about to prepare the sale and purchase agreement.

[14] On 28 November 2018 Mr RP signed the transaction documents at GHJ' offices. On 29 November 2018 Mr AB travelled into the Central City and attended upon Mrs RP, for her to sign the documents.

[15] Settlement was concluded on Friday 30 November 2018. On that day also, GHJ debited fees from funds held on behalf of Mr and Mrs RP, in the total sum of $3,683.25.

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[1] There is a dispute as to whether Mr AB gave a GST inclusive or exclusive estimate. However, because the review issues have been narrowed and do not include a consideration of the estimate, I do not need to resolve that dispute.

[16] On Tuesday 4 December 2018 Mr F emailed Mr RP to confirm that settlement had been completed. He attached a copy of GHJ' fees invoice.

The complaint

[17] Mr RP lodged his complaint against Mr AB with the New Zealand Law Society Complaints Service (Complaints Service), in March 2019.[2]

[18] Mr RP complained about the fees that he and Mrs RP had been charged. He said that Mr AB had provided an estimate, which turned out to be significantly less than the final invoice. He said that they had not received any indication that the estimate would be exceeded.

[19] As well, and relevant to the issues engaged by this review application, Mr RP said that no indication had been given that fees would be deducted "through the final transfer of funds."

[20] Mr RP also raised an issue as to whether Mr AB had misled the Bank A in relation to preparation and signature of the sale and purchase agreement.

Response

[21] In a letter to the Complaints Service dated 12 August 2019, and relevant to the issues on review, Mr AB said the following:[3]

(a) GHJ uses standard terms of engagement which include an authority by their clients to deduct fees from funds held.

(b) It is not clear whether the RPs were issued with terms of engagement.

(c) As a result, GHJ has reviewed its procedures for issuing terms of engagement and it is now more streamlined and automated.

(d) GHJ did act for the RPs in 2012 and 2013 at which time fees were deducted from funds held, and so this was a practice with which the RPs were familiar.

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[2] Because the Committee decided to take no further action on aspects of Mr RP's complaint, and he has not applied to review those decisions, the issues for me to consider are narrower than those raised by Mr RP in his complaint. I will briefly summarise but not otherwise deal further with those matters.

[3] At the review hearing Mr AB sought to distance himself from his written response to the complaint, saying that it had been prepared by Mr F and that he (Mr AB) did not read it before signing it. I discuss this later in my decision.

(e) The 2018 legal work had been delegated by Mr AB to Mr F, then only with GHJ for a matter of a week. Mr F was unfamiliar with the firm's policy and protocol in relation to terms of engagement. Nevertheless, Mr AB should have ensured that terms of engagement were issued.

(f) An invoice did not appear to have been provided to the RPs before the fee was deducted from funds held, which was an oversight. Mr AB apologised to the RPs for this.

[22] Mr AB attached copies of GHJ' standard terms of engagement.

Further comments

[23] Mr RP commented on Mr AB's response to his complaint, in an email to the Complaints Service dated 17 November 2019. Relevant to the issues on review, Mr RP confirmed that he and his wife had not received terms of engagement for the 2018 legal work.

Standards Committee's Notice of Hearing

[24] Having received and considered the parties' submissions, the Committee decided to set the following matters down for a hearing on the papers:[4]

> Fees:
>
> a) Did Mr AB fail to comply with r 3.4 (provision of information about fees) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 [the Rules]?
>
> b) Did Mr RP request, and was he provided with, an estimate of fees? If so, did GHJ inform him promptly when it became apparent that the estimate was likely to be exceeded? (r 9.4)
>
> c) Did Mr AB provide any information to justify the fee being over and above the 'standard fee' Mr RP says he was advised of? If so, would or could that amount to unsatisfactory conduct?
>
> d) Did Mr AB charge a fee that was more than fair and reasonable for the services provided? (rr & 9 9.1)
>
> e) Did Mr AB breach reg 9 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 and therefore breach r 9.3 of [the Rules]. If so, is that a breach that might amount to unsatisfactory conduct in the circumstances? (s12(c) of the Act).

[25] As a result of the Committee's determination on the above issues, only (a) and (e) above are to be considered by me in this review application. The Committee

[4] Standards Committee Notice of Hearing (20 February 2020).

determined to take no further action on the other three issues, and Mr RP has not applied to review those findings.

Standards Committee determination

Terms of engagement[5]

[26] The Committee noted that despite Mr AB saying that Mr and Mrs RP, as previous clients of GHJ, were aware of the firm's terms of engagement, Mr AB was unable to provide a copy of any previous terms of engagement which might support this submission.

[27] In those circumstances, the Committee held that Mr AB could not rely on the exception contained in r 3.6 of the Rules.[6] The Committee held that Mr AB had failed to comply with rr 3.4 and 3.5 of the Rules in that he failed to provide Mr and Mrs RP with terms of engagement.

[28] The Committee held that this was unsatisfactory conduct, pursuant to s 12(c) of Lawyers and Conveyancers Act 2006 (the Act).

Trust Account Regulations[7]

[29] The Committee first set out r 9.3 of the Rules, which provides:

> A lawyer who wishes to debit fees held in trust or to receive funds to cover fees in advance must comply with the requirements of regulations 9 and 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

[30] Regulation 9 of the Trust Account Regulations provides (where relevant):

> **Restriction on debiting trust accounts with fees**
>
> (1) No trust account may be debited with any fees of the practice … Unless –
>
> (a) A dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the inspectorate; or
>
> (b) an authority in writing in that behalf, signed and dated by the client, specifying the sum to be so applied and the particular purpose to which it is to be applied has been obtained and is available for inspection by the inspectorate.

[5] Standards Committee determination at [25]–[32].
[6] This allows a lawyer to rely on terms of engagement previously given to a client on other matters, provided the terms "remain accurate".
[7] Standards Committee determination at [48]–[53].

> (2) If fees are debited under subclause (1)(a), an invoice must be delivered or posted to the person who has a legal or beneficial interest in the trust account to be debited before or immediately after the fees are debited.
>
> …

[31] Noting that "Mr AB accepts that an invoice should have been provided to Mr RP before the fee was deducted from funds held on trust", the Committee turned to consider whether this justified a disciplinary finding.

[32] The Committee referred to an earlier Review Officer's decision in which it had been made clear that there "is limited room to exercise a discretion when breaches [of the Trust Account Regulations and the Act] occur, and that "by not adopting a reasonably stringent response to breaches when they occur, the effectiveness of the protections which the Regulations and the Act were designed to achieve, is lessened."[8]

[33] For those reasons, the Committee found this breach to be unsatisfactory conduct pursuant to s 12(c) of the Act.

Penalty

[34] Having made findings of unsatisfactory conduct, the Committee imposed a fine of $3,000 and ordered Mr AB to pay costs to the New Zealand Law Society of $1,000.

Application for review

[35] Mr AB lodged his review application on 30 June 2020. He said:

(a) It was Mr F's "delegated responsibility to ensure that a client engagement letter was sent and signed by the client." It was not Mr AB's practice to ensure that this was done.

(b) A letter of engagement had been sent to Mr RP when GHJ acted for him in 2012. Mr AB attached that letter of engagement to his review application.

(c) At the time of responding to the complaint, the 2012 letter of engagement had not been located.

[8] *Law Firm A v Standards Committee* LCRO 319/2012.

(d) Because a letter of engagement had been provided in 2012, Mr AB had complied with his obligations under rr 3.4 and 3.5 of the Rules in relation to the 2018 legal work.

(e) An invoice was issued for the 2018 legal work on 30 November 2018, the date on which the transaction is settled. Following the invoice being issued, fees were deducted.

[36] Mr AB said that he had very little to do with the RPs in relation to the 2018 legal work, and had delegated the matter to Mr F. He said that he became involved towards the date of settlement, when a degree of urgency arose.

Response

[37] Mr RP's response to Mr AB's review application included the following:

(a) they did not receive a copy of GHJ' invoice until it was emailed to them by Mr F on 4 December 2018.

(b) The 2012 terms of engagement refers to an estimate of $1,300 for that legal work but no justification has been provided for the fees charged in relation to the 2018 legal work.

(c) The basis of fees to be charged for the 2018 legal work was never explained, nor were the RPs told that fees would be deducted from funds held.

Nature and scope of review

[38] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[9]

> … 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" …

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

> … 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.

[39] More recently, the High Court has described a review by this Office in the following way:[10]

> 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.

[40] 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.

Hearing in person

[41] Mr AB's application for review was progressed before me at a hearing in City A on 11 November 2020. Both Mr AB and Mr RP appeared.

[42] I confirm that I have read Mr RP's complaint, Mr AB's response to it, Mr RP's comments on that response and the Committee's determination. I have read Mr AB's application for review and Mr RP's response to that. I have also heard from them both in person.

[43] There are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either party.

Discussion:

[44] There are two issues for me to consider:

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

(a) Did Mr AB provide the RPs with terms of engagement when accepting instructions to act on the transfer and refinancing transaction? This principally engages consideration of r 3.6 of the Rules.[11]

(b) Did Mr AB deduct legal fees from funds held on behalf of the RPs, without a legal basis for doing so? This principally engages consideration of s 110 of the Act, r 9.3 of the Rules and reg 9 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Trust Account Regulations).

[45] I discuss each in turn, further below.

[46] However, I first address a submission made by Mr AB about the letter sent under his name and signature to the Complaints Service, responding to the RP's complaint.

[47] As footnoted by me above at [3], at the hearing Mr AB sought to distance himself from the submissions that had been lodged with the Complaints Service on his behalf. He said that the letter which went to the Complaints Service had been prepared by Mr F, and signed by Mr AB without reading it. He now says that there are factual matters in those submissions which are incorrect.

[48] Whilst I do not doubt that this is what in fact occurred, it is troubling that a lawyer who is the subject of a complaint about their conduct would not carefully give instructions as to what the response should say, and then read the response that has been prepared on their behalf. There is nothing irregular about a lawyer instructing someone else to prepare their response, but it presents as irresponsible for that lawyer not to carefully check each word of what has been said on their behalf to make sure that it accurately conveys the lawyer's response.

[49] With no small measure of reluctance I will accept Mr AB's more recent submissions, where there are inconsistencies between the letter sent to the Complaints Service as Mr AB's response to the complaint, and Mr AB's submissions as part of his review application.

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[11] The expressions "client service information", "client care information" and "terms of engagement" are largely synonymous. For ease of reference in this decision I will refer to "terms of engagement" as encompassing the information a lawyer is required to provide to their clients, pursuant to r 3.4 and following, of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[50] I do so because as an Officer of the Court I must assume that Mr AB, in appearing before me in review proceedings, would be forthright and frank and only make submissions in person that were truthful in every respect.

[51] I do note that Mr AB was candid enough to acknowledge that he signed the complaint response letter without reading it. I imagine that there was a level of discomfort for Mr AB, a lawyer with well over 40 years' experience, in admitting this.

Terms of engagement

[52] Mr AB's short point is that when his firm acted for the RPs six years earlier in 2012, the firm's standard terms of engagement were provided to them. At the hearing he produced a copy of what he said were those terms of engagement, having told the Committee that they could not be located.

[53] As well as a copy of the standard terms of engagement, Mr AB produced an email sent by the lawyer then acting for the RPs.

[54] The email (dated 17 October 2012) is described as a letter of engagement. It refers to terms of engagement being accessible on the firm's website. The email has been signed by Mr and Mrs RP, who by their signatures acknowledged that they accepted the firm's terms of engagement.

[55] The terms of engagement which Mr AB produced, refer to the deduction of fees from funds held. Specifically:

> You authorise us to deduct our fees and disbursements from any property settlement, judgment, bank loan or other money received by us on your behalf.

[56] Mr AB correctly argues that if a lawyer has previously supplied terms of engagement to their client then, there is no need to repeat that with a new retainer if "the information remains accurate."

[57] When pressed, Mr AB was unable to confirm that the terms of engagement he produced were in fact those in use by the firm in 2012. He said that he presumed that they were, because he would have been informed of any updates or other amendments to those terms between 2012 and 2018.

[58] The emailed letter of engagement sent to the RPs in 2012:

(a) Related to legal work for the sale of their home;

(b) Provided a fees estimate of $1,300 plus GST and disbursements;

(c) Was not sent by either Mr AB or Mr F (the latter not then employed by GHJ); rather, it was sent by a lawyer who subsequently had no involvement in the 2018 transaction (and indeed may no longer have been employed by GHJ in 2018).

[59] The terms of engagement refer to fees and note that "staff members' hourly rates [will be provided] on request". The terms also refer to estimates, noting that GHJ will inform their client "if we are likely to exceed the estimate by any substantial amount."

[60] It is clear that neither a letter of engagement nor any terms of engagement were provided to the RPs for the 2018 legal work.

[61] When Mr RP first spoke to Mr AB in early November 2018, an estimate of $1,500 to $1,700 was given by Mr AB.

[62] I note that in a copy of a handwritten file note made by Mr AB at the time he first spoke to Mr RP on 7 November 2018, he recorded:

> Please start new file for [Mr] RP – re: purchase of property from company.

[63] In my view, that is the time – opening a file – when GHJ might be expected to generate a letter of engagement and specify the firm's terms of engagement. This would have been Mr AB's responsibility, as Mr F did not commence employment with GHJ until 14 November 2018.

[64] However, the legal work did not formally commence until later in November 2018 – around 19 or 20 November.[12] This was because when Messrs RP and AB first spoke earlier that month, Mr AB had said that no meaningful legal work could commence without a valuation. He left Mr RP to attend to that. He did not follow that issue up with Mr RP. Mr RP instructed the valuer, dealt directly with him, received his valuation report and forwarded that to Mr AB.

[65] Mr AB said that it was receipt of the valuation that triggered the legal work. It was then that he delegated that work to Mr F. In terms of his firm's policy and protocol, Mr AB assumed that Mr F would prepare and send a letter of engagement to the RPs.

[66] Despite observing that the natural time to generate terms of engagement would have been when the file was opened on or about 7 November 2018, I accept that substantive legal work was not triggered until either 19 or 20 November 2018. In

[12] Mr RP emailed the valuation report to Mr AB on 19 November 2018. Mr AB did not look at it until prompted to do so by a telephone call from Mr RP on 20 November.

those circumstances it is not unreasonable for terms of engagement to be issued at that time, when a clearer picture of the scope of the retainer had emerged.

[67] Certainly, there can be no excuse for not issuing terms of engagement by 19 or 20 November 2018.

[68] As noted above, on 7 November 2018 Mr AB gave the RPs an estimate of $1,500 to $1,700 for legal fees.

[69] As against that, Mr AB's final invoice to the RPs was based upon time spent.

[70] In his letter to the Committee, Mr AB said:

> 17 In this instance, Mr RP's transfer did not fall into the standard category and I believe that was very clear, given the need for additional attendances to travel to see Mr RP's wife for execution of documents some 20 kilometres away in City A's CBD. My time attendance to do that was almost 2 hours in total. …
>
> 18 …
>
> 19 I again refer to [Mr F's and my time records] and point out that the total time attendances recorded for this matter amount to 9.5 hours of work and a total value of $3,460.00 excluding GST. When I set the fee for the work, I considered the nature and value of the work as well as the attendances …. To that end, and although time records were almost $3,500 … I set the fee at $3,000 plus GST and disbursements.
>
> 20 …[A]ttendances were [more] involved in this instance and I note that half a decade has passed [since we acted for the RPs in 2012] and naturally fees have increased. … I also note that the narrations on [the 2012 invoice] was far simpler than that on our 2018 invoice. The more comprehensive detail on the 2018 invoice was part of an effort to outline to Mr RP the additional attendances involved.

[71] At the hearing, Mr AB did not disagree with what was said in his complaint response letter, as set out by me above.

[72] Two things are apparent.

[73] First, the terms of engagement as between the 2012 and the 2018 legal work differ in a fundamental respect. The 2012 work proceeded on the basis of an estimate, recorded in writing and qualified in the usual way as to the possibility of the estimate being exceeded.

[74] The 2018 work was initially discussed in terms of an estimate, but this was before the retainer was formalised. Mr AB's approach to charging for the 2018 work, was on a time and attendance basis, discounted because the RPs were existing clients.

[75] It has been said time and again by both Standards Committees and Review Officers that the provision of terms of engagement by a lawyer to their client, in advance, is a fundamental obligation imposed by the Rules. I do not need to cite authority for this: it is probably one of the better known rules.

[76] The rationale for requiring terms of engagement, and providing them in advance, recognises and reflects one of the principles underpinning the Act – consumer protection.[13] This principle in turn recognises the power imbalance between a lawyer and their client, as to specialist knowledge.

[77] There can seldom if ever be short-cuts when it comes to a lawyer's obligation, clearly set out in r 3.4 (and following) of the Rules and under the heading "Provision of information," to provide their client with detailed terms of engagement for their retainer.

[78] Uppermost in the minds of most clients will be the question of legal fees: how are they to be charged, and how much will they be?

[79] It cannot be said that, in relation to fees, the 2012 terms of engagement "remained accurate" for the purposes of the 2018 legal work.

[80] I find that Mr AB failed to provide accurate fees information to the RPs when he began their 2018 legal work on 19 or 20 November 2018. Having given an estimate on 7 November 2018, Mr AB obviously decided when he began the legal work some two weeks' later, to charge fees on the basis of time (and the other factors referred to in r 9.1 of the Rules).

[81] Secondly, in his submissions to the Complaints Service Mr AB acknowledges that the character of the 2018 work was different from the 2012 work, he acknowledges that fees rates have increased over six years and he acknowledges that the RPs were charged fees on a different basis in 2018.

[82] However, Mr AB argues that his firm's 2012 and 2018 terms of engagement were identical in one important respect – namely the client's authority to deduct fees from funds held.

[83] If I accept for a moment that the terms of engagement produced by Mr AB at the hearing were in fact the same as those in use by his firm in 2012, I do not agree that this apparently identical provision allows him to rely on the exception in r 3.6 of the Rules. It will be remembered that the exception excuses a lawyer from providing

[13] Section 3(1)(b) of the Act.

terms of engagement in a fresh retainer with an existing client, if those terms have been previously supplied "and the information remains accurate."

[84] In my view, an authority to deduct fees from funds held will only have real meaning for a client, if that client knows in advance the basis upon which fees are going to be charged: whether by estimate (as with the RPs in 2012) or on the basis of hourly rates (as occurred in 2018).

[85] Terms of engagement merely reflect a lawyer's indication of contractual terms for a proposed retainer. A client is free to negotiate any of those terms with the lawyer, and the parties can agree to an amendment or variation of the proposed terms.

[86] Knowing that they were in fact going to be charged on the basis of an hourly rate in 2018, rather than on the basis of an estimate as they had been in 2012 and as had been indicated on 7 November 2018, it is conceivable that the RPs may have balked at a general authority to deduct fees from funds and may have insisted upon a quote, or on authorising specific invoices as they were issued.

[87] I am not satisfied that the 2012 terms of engagement produced at the hearing by Mr AB (if they are indeed from that time) "[remained] accurate" for the purposes of the 2018 legal work.

[88] Significantly, and in my view fatal to Mr AB's argument, is the fact that if a lawyer intends to rely on the exception in r 3.6 of the Rules, then they must show that they turned their mind to this issue at the relevant time. In other words, when commencing a fresh retainer for an existing client, before deciding whether or not to re-issue terms of engagement a lawyer must look at their earlier terms of engagement and satisfy themselves that they "remain accurate" for the purposes of the new retainer with that client.

[89] If the terms of engagement remain accurate, then further terms need not be provided.

[90] Mr AB said that he presumed that Mr F had sent terms of engagement to the RPs in November 2018. His argument that he could rely on the 2012 terms of engagement, only arose once he learned that Mr F had not done so – at the time he received the RPs' complaint.

[91] There is no evidence that Mr F turned his mind to the 2012 terms of engagement and asked himself whether they "remained accurate" before commencing

the 2018 legal work for the RPs. There is no evidence that as a new employee, Mr F raised that question with Mr AB.

[92] A lawyer who overlooks the question of terms of engagement when agreeing to act for an existing client in a new matter, cannot subsequently rely on the exception in r 3.6 of the Rules when being called to account for failing to provide them to that client in the fresh retainer.

[93] The above has presumed that the terms of engagement now produced by Mr AB were in fact those in existence in 2012. The terms produced at the hearing had been printed from GHJ' database by Mr AB when he prepared and lodged his review application in June of this year.

[94] As to whether the terms of engagement he produced at the hearing were the same as those in use in 2012, Mr AB said that no one had told him during that time that they had been changed. He said that he would expect to have been consulted about any changes.

[95] In my view that is not the same as stating definitively that there had been no changes. As expressed by Mr AB, it leaves room for the possibility that some amendments were made over the six year period between October 2012 and November 2018, and that he was simply not told about them (for whatever reason).

[96] However, I do not need to resolve that issue because for the reasons I have given above, even if the 2018 terms were the same as the 2012 terms, I do not consider that, for the purposes of the RPs' 2018 retainer, those earlier terms remained accurate.

[97] Moreover, it is clear that Mr AB had not turned his mind to that question when beginning the 2018 legal work for the RPs.

[98] Albeit for different reasons, I agree with the Committee that this represented a breach by Mr AB of r 3.4 of the Rules, and that it was unsatisfactory conduct.

Fees deduction

Legislative and other framework

[99] It is helpful to summarise the legislative and other framework concerning the ability of a lawyer to deduct fees from funds held on behalf of a client. There is some repetition from above; however I consider it necessary to set the various provisions out in a logical sequence.

[100] The starting point is s 110 of the Act, which provides (where relevant):

> **110 Obligation to pay money received into trust account at bank**
>
> (1) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person—
>
> (a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of [the practitioner] and
>
> (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.

[101] Next, r 3.4(a) of the Rules provides (footnote omitted):

> **Provision of information**
>
> 3.4 A lawyer other than a barrister sole must, in advance, provide in writing to a client information on the principal aspects of client service including the following:
>
> (a) the basis on which the fees will be charged, when payment of fees is to be made, and whether the fee 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)

[102] Following on from that, r 9.3 of the Rules provides:

> **Fees in advance**
>
> A lawyer who wishes to debit fees held in trust or to receive funds to cover fees in advance us to comply with the requirements of regulations 9 and 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

[103] Finally, regs 9 and 10 of the Trust Account Regulations provide (where relevant):

> **9 Restriction on debiting trust accounts with fees**
>
> (1) No trust account may be debited with any fees of a practice … unless—
>
> (a) A dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the inspectorate; or
>
> (b) an authority in writing in that behalf, signed and dated by the client, specifying the sum to be so applied and the particular purpose to which it is to be applied has been obtained and is available for inspection by the inspectorate.
>
> (2) If fees are debited under subclause (1)(a), an invoice must be delivered or posted to the person who has a legal or beneficial interest

> in the trust account to be debited before or immediately after the fees are debited.

[104] In *Heslop v Cousins* the Court was considering the issue of fees deduction from funds held, in provisions which applied under the Law Practitioners Act 1982.[14] Those provisions are to all intents and purposes identical to s 110 of the Act and reg 9 of the Trust Account Regulations.

[105] The issue before the Court concerned funds that had been lodged in a lawyer's trust account by a client, to be used for a particular purpose (repayment of a mortgage). The Court held:[15]

> … A solicitor had no lien or right of set-off if funds had been deposited into the solicitor's trust account for a *particular purpose*. In that situation the solicitor was obliged to use the funds for the particular purpose for which the funds have been entrusted to the solicitor.

[106] In addressing argument that the then-equivalent of reg 9 of the Trust Account Regulations was a code, the Court held:[16]

> … [The lawyer's] position is untenable. It is clear from [s 110] that a client's direction is fundamental and must be obeyed. [Regulation 9] is subordinate to that requirement and cannot override it. Thus even if an account is rendered a solicitor is not entitled to deduct his or her costs from funds held in the trust account if the deduction would be contrary to the client's direction.

[107] *Heslop v Cousins* has been cited with approval and followed in decisions of Review Officers.[17]

[108] In *DE v FG* the Review Officer noted the following:[18]

> [*Heslop v Cousins*] also held that a solicitor could pay out client funds only to the client or in accordance with a direction from the client pursuant to s 89 of the Law Practitioners Act, the equivalent of which is s 110 of the Lawyers and Conveyancers Act 2006. Regulation 8 of the Trust Account Regulations 1998 (now reg 9 Trust Account Regulations 2008) which dealt with the debiting of trust accounts with fees, had to be read subject to that overriding legislative obligation.

[109] As well as the above, the New Zealand Law Society has issued the *Lawyers Trust Accounting Guidelines* in which the following is recommended:[19]

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[14] *Heslop v Cousins* [2007] 3 NZLR 679 (HC).
[15] At [190].
[16] At [196].
[17] *DE v FG* LCRO 86/2014 (16 March 2015) and *ML v OP* LCRO 139/2017 (21 December 2017).
[18] At [27].
[19] https://www.lawsociety.org.nz/professional-practice/legal-practice/trust-account-management/ In the introduction to the guidelines, it is noted that they "are not mandatory [although] compliance with them will generally ensure compliance with the trust account provisions of the

> **Taking fees from trust money**
>
> 6.13 You are not permitted to deduct fees from a client's trust money unless you have provided that client with an account for the services carried out (Regulation 9(1)) and the client has authorised the deduction (Section 110).
>
> …
>
> 6.15 A practice may secure an authority to take fees by deduction through their client care and service (engagement) materials. For an authority conferment clause (to take your fees by deduction) to be sustainable, for example if challenged, it should be explicit. …
>
> 6.16 You may receive funds to cover fees in advance only on the basis that these are held for the client's account in your trust account. No deduction in respect of fees may be made from funds held unless the work has been performed, the client gives an authority for the deduction and an account has been provided to the client for the fees that are to be deducted (Regulation 10, RCCC 9.3).

[110] The Guidelines do not address the issue that was before the Court in *Heslop v Cousins* – namely, deduction of fees from funds lodged with a specific direction.

[111] On its website, amongst resources it makes available for lawyers, the New Zealand Law Society has provided suggested terms of engagement which include the following as an example of an authority to deduct fees:[20]

> You authorise us to deduct our fees and other expenses from funds held in our trust account on your behalf on provision of an invoice to you, unless those funds are held for a particular purpose. (*Note – if you wish to rely on this authority you may wish to consider requesting that the client sign and return the terms of engagement*)

[112] In summary (and relevant to the issue of debiting fees from funds held):

(a) Funds held in a trust account on behalf of a client "must be paid … [as that client] directs" (s 110(1)(b) of the Act).

(b) Client care information that must be provided in advance to each client, must include information about "whether the fee may be deducted from funds held in trust on behalf of the client (subject to [regs 9 or 10 of the Trust Account Regulations)" (r 3.4(a) of the Rules).

(c) A lawyer may elect not to include an authority to deduct fees in client care information.

Lawyers and Conveyancers Act 2006 and the Lawyers and Conveyancers Act (Trust Account) Regulations 2008."

[20] https://www.lawsociety.org.nz/professional-practice/client-care-and-complaints/client-care/

(d) Before fees can be debited against funds held in a trust account, r 9.3 of the Rules obliges a lawyer to comply with regs 9 and 10 of the Trust Account Regulations.

(e) Regulation 9 of the Trust Account Regulations allows a lawyer to debit fees from funds held if:

(i) An available, dated invoice has been issued and given to the client before deduction or immediately after, or

(ii) The client has signed and dated an authority which specifically identifies both the purpose and the amount of a fees deduction.

(f) If there is authority in a lawyer's terms of engagement to deduct fees from funds held, then the lawyer may do so upon issuing and delivering an invoice to their client (reg 9(1)(a) and (2) of the Regulations).

(g) *Heslop v Cousins* is authority for the proposition that if funds are held in a lawyer's trust account with a specific direction as to their use, equally specific authority is required before fees may be deducted from those funds. A general authority of the type usually found in terms of engagement (and recommended by the New Zealand Law Society), arguably would not appear to be sufficient.

(h) If there is no authority in a lawyer's terms of engagement to deduct fees from funds held, then s 110(1)(b) of the Act requires a lawyer to obtain that before making a deduction. Regulation 9(1)(b) dictates the requirements of that authority (signed, dated and specifying the purpose and amount of the deduction).

[113] It would seem to be the case that if terms of engagement include an authority to deduct fees from funds held, then that authority may be expressed in reasonably general terms. There is no requirement for it to be signed and dated, although the Guidelines suggest – very sensibly – that this is good practice. The exception to this is when funds are paid into a trust account with a client's specific instructions as to their use.

[114] On the other hand, if the terms of engagement do not include an authority to deduct fees from funds, then reg 9(2) requires a lawyer to obtain a detailed authority.

Analysis

[115] Mr AB's response to the Complaints Service about this issue, was that it seemed doubtful that Mr and Mrs RP had authorised fees to be deducted because GHJ had not provided them with terms of engagement. However, Mr AB did note that GHJ had previously acted for the RPs, and on that occasion had deducted fees from funds held. He said that they therefore had experience of this approach.

[116] Further and as to whether an invoice had been issued for the 2018 transaction, Mr AB told the Complaints Service "that the invoice should have been provided to Mr RP before the fee was deducted from the funds held on trust".

[117] As against that, in support of the submissions made at the hearing Mr AB:

(a) noted the date on his firm's invoice (27 November 2018), and

(b) referred to a table prepared by his legal executive, setting out the history of the firm's trust account ledger for this transaction. In particular, the following is recorded:

30/11/2018 Friday Our fee finalised and posted in to Onelaw.

[118] I accept – and indeed the evidence supports – that an invoice was created at the time or shortly before fees were deducted from funds held on the RPs' behalf.

[119] That evidence is in the form of the invoice itself which is dated 27 September 2018, as well as the trust ledger history provided by Mr AB.

[120] However, the invoice was not sent to the RPs until Tuesday 4 December 2018, when Mr F reported to them on settlement of the transaction (which had occurred on Friday 30 November 2018).

[121] Mr AB argues that because an invoice was issued, he was entitled to deduct his firm's fees from the funds held on behalf of the RPs in the firm's trust account.

[122] I disagree.

[123] I have found that Mr AB did not provide the RPs with terms of engagement. It is also clear that he did not obtain an authority of the type contemplated by reg 9(1)(b) of the Trust Account Regulations.

[124] Without one or the other, Mr AB did not have the RPs' authority to deduct fees.[21] Section 110(1)(b) of the Act makes it explicitly clear that funds held on behalf of a client may only be paid out in accordance with that client's instructions.

[125] Mr AB appears to be arguing that reg 9 of the Trust Account Regulations sets up alternative grounds for debiting fees: either issuing and delivering an invoice or having an authority in writing.

[126] This misunderstands the statutory and regulatory scheme, which I have outlined above. The starting point is that client authority to deal with their funds, is required. Either that is given in advance as part of the terms of engagement (subject to the *Heslop v Cousins* situation of a specific direction); or it is explicitly provided each time a fee is to be debited.

[127] Because of my core finding that the RPs had not provided Mr AB with authority to deduct fees from funds held, it is not necessary for me to consider Mr AB's argument about the invoice that was issued on 30 November 2018 (a Friday) and delivered to them by Mr F's email on 4 December 2018 (a Tuesday).

[128] I would simply observe that if I had found that the RPs had given authority to deduct fees from funds held, I would have had serious reservations about whether the invoice had been "delivered or posted [to the RPs] … immediately after the fees [were] debited", as is required by reg 9(2) of the Trust Account Regulation.

[129] I would have taken some persuading to accept that two working days between debiting fees and delivering the relevant invoice, was "immediate".[22]

[130] The Committee found that Mr AB had breached r 9.3 of the Rules in that he debited fees without first complying with reg 9 of the Regulations, but on the basis that he had not issued the RPs with an invoice.

[131] On the basis of the material before the Committee, it was right to conclude that none had been issued. Indeed, there was no other conclusion for it to come to as the complaint response letter signed by Mr AB, confirmed that an invoice had not been issued.

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[21] There is no evidence before me that the funds in Mr AB's trust account had been lodged with a specific direction by the RPs as to their use (*Heslop v Cousins*).

[22] See *FY v UM* LCRO 239/2010 (26 October 2011). In the context of an undertaking, the Review Officer held that the word "immediately" was to be determined by reference to the Oxford English Dictionary as meaning "without any delay or lapse of time; instantly, directly, straight away; at once" (at [17]). Further the Review Officer held that "it must be accepted that a practitioner will not be able for a variety of reasons to attend to some things. Pragmatism demands recognition of that" (at [24]).

[132] However, I have accepted that one was issued and delivered. But, as I have found (and leaving aside whether the invoice was delivered immediately after the fees were deducted), that does not save Mr AB because as a starting point, he did not have the RPs' authority to deduct fees from the funds held.

[133] I agree with the Committee that Mr AB breached r 9.3 of the Rules, but for different reasons. I consider that this was unsatisfactory conduct on his part.

Penalty

[134] The Committee imposed a fine of $3,000 to reflect Mr AB's two breaches: failure to provide terms of engagement, and deducting fees without an invoice. I have modified the fees deduction finding as having been made without the RPs' authority.

[135] The Committee did not apportion its fine as between the two breaches.

[136] As the Committee rightly observed in its determination, a lawyer's obligations in relation to the administration of their trust account (which includes deducting fees from funds held), should never be lightly dismissed. Compliance breaches will ordinarily result in a disciplinary finding.[23]

[137] In *CB v RB*, the Review Officer held (in relation to a delay of six days between debiting fees and reporting that to a client):[24]

> [42] Regulation 9 is a fundamental rule that every lawyer must know and obey.

[138] In an unpublished decision *LCRO 92/2018*, I observed in relation to regs 9 and 10 that "these demand, unsurprisingly considering their purpose, strict compliance."[25]

[139] At the hearing, Mr AB emphasised that in a career which spanned 44 years, he was only ever the subject of one costs complaint, which was dismissed. He said that a Review Officer made a finding against him following a hearing some 12 months ago, in connection with his delay in reporting to a client and failure to assist that client to find alternative legal representation. Mr AB said that this was the only disciplinary finding that has ever been made against him.

[140] Mr AB is right to point to a long and largely unblemished legal career as being relevant to the question of penalty in disciplinary proceedings.

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[23] Standards Committee determination at [51]–[52].
[24] *CH v RB* LCRO 137/2017 and 33/2018 (28 June 2019).
[25] At [61].

[141] I would however observe that, in relation to Mr AB's breach of the Trust Account Regulations, the proper administration of a trust account in relation to fees deduction should be meat and drink to a lawyer with his experience.

[142] I regard Mr AB's breach of r 9.3 of the Rules (and corresponding breach of reg 9 of the Trust Account Regulations) as being the more serious of the two breaches. Were that the only breach, I would have considered a fine of $2,500 as being an appropriate response. Limited credit can be given for a largely unblemished disciplinary record.

[143] On the other hand, if the only breach of which Mr AB had been found guilty was his failure to provide terms of engagement, then I would have considered a fine of $1,000 as being appropriate.

[144] The total fine of $3,000 imposed by the Committee is nevertheless within the range that could be expected for these two breaches. It would present as tinkering for me to increase that fine by $500.

[145] I therefore confirm the Committee's order that Mr AB pays a fine of $3,000.

[146] As well, the Committee ordered Mr AB to pay costs of $1,000. Given that I have upheld the Committee's findings (albeit for different reasons), it is appropriate for me to confirm that order.

Decision

[147] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, and albeit for different reasons, the decision of the Standards Committee is confirmed.

Costs on review

[148] When a Committee's adverse finding is upheld by a Review Officer, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr AB is ordered to pay costs in the sum of $1,200 to the New Zealand Law Society by 5pm on Monday 21 December 2020, pursuant to s 210(1) of the Act.

Enforcement of costs order

[149] Pursuant to s 215 of the Act, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[150] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 27th day of November 2020

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R Hesketh
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 AB as the Applicant
Mr RP as the Respondent
Ms AB as a Related Person
[City] Standards Committee [X]
New Zealand Law Society