LCRO 158/2011

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of Auckland Standards Committee 1
BETWEEN	**RI** Applicant
AND	**MR B HART** Respondent

The names and indentifying details of the parties in this decision (with the exception of the Respondent) have been changed.

Introduction

[1] In April 2006, RI instructed Mr Hart to advise and act with regard to what she considered to be criminal actions by MS, her daughter's gynaecologist, and/or KR, as the Head of CBA. The claims arose out of what she believed had been a mix-up in the biopsy material of her daughter with that of another woman, and as a result of which, her daughter had (unnecessarily, she believes) undergone further invasive medical procedures with detrimental effects for her daughter.

[2] Having considered all of the material available to it, the Standards Committee determined to take no further action in respect of the complaint. It's reasons for making this determination are discussed in the body of this decision.

[3] RI has applied for a review of that determination.

Mr Hart's responses to the review application

[4] Mr Hart was advised of the application for review by letter dated 18 July 2011

and invited to comment by 2 August 2011. No response was received from him and, on 18 August, the Case Manager reminded him of this.

[5] On 25 August 2011, the Case Manager wrote to Mr Hart as follows:

> It is noted that you have not provided any comments on this Application for review forwarded to you under cover of our letter 18 July. It is therefore assumed that you have nothing further to add to the submissions made to the Standards Committee. The LCRO considers that this is a matter which may be determined on the papers and information held to date. You will note that the Applicant has consented to the matter being dealt with on that basis. Please advise if you similarly consent by no later than Thursday, 8 September 2011.

[6] On 26 August, Mr Hart advised that he relied on his submissions to the Standards Committee. However, in response to a specific enquiry from the Case Manager as to whether he consented to the matter being dealt with on the papers, he advised that he wished to be heard in person.

[7] RI advised that she was unable to (and did not wish to) attend any hearing in person, nor did she wish to attend the hearing by telephone.

[8] In December 2011, this Office sought advice from Mr Hart as to possible hearing dates in April/May 2012. After consultation with Mr Hart's staff, a hearing date was scheduled for 10 April 2012.

[9] On 5 April 2012, this Office was advised that Mr Hart was unable to attend the hearing for health reasons and a medical certificate was provided by Mr Hart's office. The hearing was therefore adjourned.

[10] In conjunction with the adjournment, consent was again sought from Mr Hart to the matter being dealt with on the papers as I considered all material necessary to complete the review was available on the files.

[11] On 20 April 2012, a follow-up request was sent to Mr Hart. No reply was received and thereafter, the Case Manager had extreme difficulty in obtaining a response from him. On 8 May 2012, I therefore issued a Minute which included the following:

> [8] Given the difficulty in securing agreement from Mr Hart for this matter to be scheduled, I have therefore determined that the matter be set down for hearing on Monday, 11 June 2012 at 10am. If Mr Hart is unavailable on that date, he can arrange for his submissions to be presented on his behalf. Alternatively, Mr Hart may provide written submissions at any time prior to that date, and his consent pursuant to section 206(2)(b) [of the Lawyers and Conveyancers Act 2006] for the matter to be determined on the material to hand.

> [9] The respondent's [this should have referred to the Applicant] application for review was lodged on 15 July 2011. Section 200 of the Lawyers and Conveyancers Act obliges me to conduct the review with as much expedition as is permitted. No adjournment to the date fixed by this Minute will be granted unless extraordinary circumstances prevent Mr Hart from either appearing on that date, or from preparing submissions to be presented on his behalf, or provided to this Office in writing prior to that date.

[12] On Friday, 8 June 2012, at 3.14 p.m., an email was received from Mr Hart's office

> seeking an indulgence of the tribunal and … [seeking] an adjournment of the matter. The request is made on Mr Hart's behalf as he is appearing in a High Court trial in Wellington on this date. If this matter could be resolved by way of written submissions, Mr Hart's office will be able to file those accordingly and would seek a timetabling direction.

[13] On 11 June 2012, a further Minute was issued by me in which I noted that the Minute of 11 May provided that if Mr Hart was unavailable on 11 June, he could arrange for his submissions to be presented on his behalf or alternatively, he could provide submissions in writing prior to that date. In that Minute, the date for providing submissions was extended to Monday, 18 June 2012.

[14] On 18 June, a request for a further extension was received from Mr Hart's office, which was declined.

[15] On 19 June 2012, submissions were received from Mr Hart. They are attached to this decision. They are brief and, in short, merely submit that the determination of the Standards Committee should be upheld. They add nothing to previous submissions and comments provided by Mr Hart and, given the delays that have occurred because of Mr Hart's request to be heard in person, and his subsequent lack of co-operation with this Office in scheduling a date, I consider that the submissions provided were indicative of a lack of regard to RI's right to apply for a review of the Standards Committee determination and the review process.

[16] The request to be heard in person, the subsequent difficulties in setting a date acceptable to Mr Hart, the adjournments and the requests for extensions of time, have all added to the delay in completing this review. Section 200 of the Lawyers and Conveyancers Act requires the LCRO to conduct a review with as much expedition as is permitted by the requirements of the Act, a proper consideration of the review and the rules of natural justice. Mr Hart's actions have hindered and obstructed this Office from meeting the obligations in terms of the Act and added to the costs involved in this review. This will be reflected in the costs Orders in this decision.

The email correspondence

[17] A review of the email correspondence between RI and Mr Hart and LT (who was assisting Mr Hart in this matter) reveals an increasing sense of frustration, annoyance, anxiety and bewilderment on the part of RI. As December 2010 approached, she became more anxious that proceedings had not been lodged. She understood that proceedings were required to be lodged within five years of the event to which the proceedings related and made reference to this more and more as the date approached.

[18] This understanding was incorrect, in that with the leave of the Court, proceedings could be lodged within six years of the event. At no time, however, did Mr Hart correct RI's understanding, nor did he take any steps to apply to the Court for the necessary leave to commence proceedings within the six-year period.

[19] The overwhelming impression that is gained from a review of the correspondence is one of continual excuses being provided by Mr Hart and LT as to why they had not been able to give RI's file their attention.

[20] The Standards Committee considered that the correspondence explaining the causes of delay adequately addressed any concerns the Committee had. A close examination of the email correspondence reveals that it contained little more than ongoing reasons why other matters being dealt with by Mr Hart and LT were taking priority over RI's instructions.

[21] To give the flavour of the nature of the correspondence, there is attached to this decision a schedule containing some of the correspondence between the parties and the reasons provided by Mr Hart and LT for their inactivity.

[22] As a result of this inactivity, little in the way of substantive progress was made. This was not, as far as RI had been advised by Mr Hart, due to any concerns about the validity of the case against the Doctors. In a letter dated 10 September 2009, Mr Hart assured RI that "[o]ur view is that we have a good case and that proceedings are justified".

[23] To illustrate the lack of progress, I set out below a timeline of events which occurred during the course of this matter:

April 2006 – Mr Hart and LT instructed

29 June 2006 - $15,000 paid to Mr Hart

June to August 2006 – preliminary correspondence with various parties seeking information and medical slides

13 March 2007 – LT meets with LS

31 May 2007 – LT reports on March meeting with LS

5 June 2007 – LT writes to LS to request report

1 February 2008 – Mr Hart writes to RI following her expressions of concern by the lack of progress. Mr Hart agrees all future correspondence to be between himself and RI. Mr Hart expresses desire to "get the matter moving".

11 February 2008 – RI notes no further communication from LS

6 March 2008 – Mr Hart advises meeting with LS

8 March 2008 – report received from LS

23 March 2008 – RI expresses frustration that report from LS unhelpful and declines to pay his costs

June 2008 – approach to CBB in UK on recommendation of LS to assist with DNA fingerprinting

12 December 2008 – letter from Mr Hart to RI regarding formulation of formal instructions to CBB

16 February 2009 – final letter of instructions to CBB

29 June 2009 – CBB advises unwilling to accept instructions

10 September 2009 – letter from Mr Hart to RI recommending civil proceedings against Doctors. First reference to ACC payout.

January 2010 – preparation of draft Statement of Claim, claiming compensatory and exemplary damages. Cause of action expressed to be breach of duty of care.

April 2010 – Mr Hart advises RI that she needs to instruct lawyer with expertise in civil proceedings. Approaches LR

7 May 2010 – LR advises unable to accept instructions

21 October 2010 – Mr Hart advises a "number of legal impediments to negotiate" before proceedings can be filed

May to November 2010 – increasing concern expressed by RI that proceedings not filed

12 November 2010 – RI writes to Law Society for assistance.

[24] A summary of the activity (or lack of activity) over the four and a half years during which Mr Hart was seized of instructions is as follows:

- LS instructed to provide report on how to proceed which RI finds unhelpful and not constructive
- Approach made to CBB to assist with DNA report, but eventually declined
- Decision that civil proceedings should be issued. Proceedings in draft format only and not filed
- Mr Hart has acknowledged that the matter "languished" from June 2007 to February 2008 and again from July to December 2008.

Advice re Accident Compensation legislation

[25] Following RI's letter to the Law Society seeking assistance, she made contact with RJ, a barrister from Wellington. In emails to RI over a period of two weeks, RJ advised as follows:

- that the Doctors could not be sued for compensatory damages if RI's daughter was covered by ACC
- to ascertain whether she was covered by ACC, a claim should be lodged
- at the same time, RI should contact the Health and Disability Commissioner and request the matter to be investigated
- only exemplary damages may be sought if RI's daughter was covered by

ACC but only then if the Doctors had an intention to harm or were grossly reckless

- if RI's daughter did not have ACC cover, she could sue for compensatory damages
- that the limitation period was two years from the date on which the cause of action arose but six years with the leave of the Court
- that any findings by the Health and Disability Commissioner could help with possible Court proceedings
- that an ACC claim was the key to determining what proceedings could be brought.

[26] In his submissions to the Law Society dated 20 May 2011, Mr Hart does not dispute the correctness of any of these comments which were included by RI in her letter to the Society of 6 January 2011. He submits, however, that:

> [RI] knew from the start that her daughter could pursue remedies under the ACC legislation – it was an option. Part and parcel of this was whether she had cover. The views of [RJ] in relation to ACC and HDC were matters that had previously been addressed – see the claimant's response to the draft letter dated 10 September 2009.

[27] RI's comments on that particular paragraph are as follows:

1. ACC has "no fault policy" since 2004.
2. Med pract. may be ordered to work under supervision for a period of time, to ensure competence – HPCA 2003.
3. ACC does not pay bulk any more.
4. ACC may pay some small instalments for medical costs that may and when arise in the future.
5. ACC and HDC (Health and Disability Commissioner) are the biggest legalised criminals in NZ.

[28] There is no doubt that RI was aware of the ACC legislation. However, her responses indicate that she did not consider either that there would be sufficient consequences for the Doctors or that payment from ACC would be satisfactory. Her responses do not show any awareness of what proceedings could be brought against the Doctors or the time limitations that existed.

[29] As Mr Hart notes in the draft letter of 17 February 2011 RI had no wish to deal

with ACC or the HDC. However, it would appear from the advice provided by RJ that whether RI's daughter was covered by ACC or not was critical to the nature of the proceedings that could be issued, and to the heads of damage that could be sought. Regardless therefore of whether or not RI wished to deal with ACC it would seem that she should have been advised to lodge a claim to establish what form the proceedings were to take.

[30] RI says she was not advised about the relationship between the ACC legislation and the nature of proceedings that could be issued. Mr Hart says she was. Given the nature of the issues arising, it would be reasonable to expect some fairly detailed advice in writing would have been provided to RI.

[31] Mr Hart cannot point to any written advice provided to RI by him in this regard. In addition, LT's memo to Mr Hart of 9 October 2009 and the research requests by him in November 2009 would indicate that they were only then, some 3 years after being instructed, beginning to address the issue. The memo certainly does not give the impression that any definitive advice had been provided to RI.

[32] During the four and a half years that Mr Hart acted for RI, he did not specifically address the relationship between ACC and potential court proceedings. The first mention of ACC in correspondence would seem to be in September 2009.

[33] There was no advice in any of the correspondence that I have sighted which referred to the limitation periods as explained by RJ. The many emails from RI expressing her concern that proceedings had to be brought within five years of the date on which the cause of action arose, was neither commented on nor corrected by Mr Hart.

[34] Mr Hart asserts that ACC was mentioned in his initial meeting with RI. However, the memorandum from LT, dated 9 October 2009, indicates that no firm advice had been given to her. In paragraph 4 of that memorandum, he states:

> There is a need to establish duty of care, breach, causation (i.e. injury results from the breach) and entitlement to damages. In this context consideration of cover under the Accident Compensation legislation and whether there is a right of civil action is important.

[35] Further, at paragraph 24 of the same memorandum, he notes:

> [RI's] response to my mention of the Accident Compensation regime indicated that she had considered recovery under the scheme. It was unclear however to me whether any payment has been made to [RI's daughter] under that scheme.

> If so, that may be a factor that is relevant in determining entitlement to compensation by alternative civil action. **I do not know the current answer but it may be that it needs to be considered.** [emphasis added]

[36] At paragraph [42] of its decision, the Standards Committee noted:

> The Committee considered that it was reasonable in [*sic*] circumstances that the complainant, a health provider with ten years experience, ought to have been aware of the ACC limitations on civil proceedings. ACC legislation is critical to the practice of health professionals in New Zealand. From the information provided, the Committee concluded that this complaint could not be sustained.

[37] RI and her family consulted Mr Hart, a barrister, for advice with regard to what they saw as a serious lapse in procedure and systems with regard to the handling of medical samples, as a result of which RI's daughter had undergone an unnecessary invasive medical procedure.

[38] Mr Hart was consulted for his knowledge of the law. His retainer was expressed to include "assessing likely causes of actions against [MS], [KR] and/or [CBA]" and "evaluating likely options, including outcomes".

[39] Mr Hart has supplied evidence that LT had sought research from the Law Society library on the issues arising in this case. There is no evidence on the review of the research of any definitive advice provided to RI.

[40] The ability to bring any action as well as the nature of the proceedings which could be brought, was fundamentally affected by the ACC legislation. In addition, the time limits imposed by the Limitation Act were also of utmost importance as to when proceedings had to be instituted.

[41] Most medical practitioners would hope that they do not need to concern themselves with limitations imposed by ACC legislation on their exposure to legal proceedings during the course of their careers. For the Standards Committee to determine that RI "ought to have been aware of the ACC limitations on civil proceedings" is a striking assumption for the Committee to make. They would probably be aware of the broad limitations imposed on potential litigants by the ACC legislation, but even the brief advice provided by RJ would probably exceed the knowledge of many medical practitioners. In addition, it must be remembered that RI qualified as a [occupation 1] in [country] (and presumably emigrated to New Zealand) and as a [occupation 2] in New Zealand and would not have been exposed to the ACC legislation until she came to New Zealand.

[42] In any event, it is Mr Hart who had the responsibility to at least ascertain whether RI had the knowledge that the Committee determined she "ought" to have had.

[43] I have given careful consideration to these comments. I have noted that the Convener of the Standards Committee is a person with considerable litigation experience and members of the Committee also comprise practitioners with experience in litigation. However, I am unable to accept the Committee's determination that it was acceptable for Mr Hart to assume this knowledge of RI.

RI's claims

[44] RI makes allegations and attributes a degree of intent to Mr Hart for which there is no evidence. For example –

- that Mr Hart's actions were "simple manipulation with the purpose of keeping the victim – us – in the controlling bubble"
- that Mr Hart threatened them and that "it might well be that Mr Hart intended to make us fear for our lives"
- that Mr Hart's actions were premeditated with a view to extending his inaction beyond the six-year limitation period so that "the case loses chance [sic] for justice to be served"
- that Mr Hart's conduct was "deliberate" and "highly motivated".

[45] The standard of proof in disciplinary proceedings is the civil standard of proof of applied flexibility.[1] RI's allegations of intent and premeditation simply cannot be proved and are not accepted.

[46] RI also asserts that the payment of $15,000 to Mr Hart was a contingency fee which should be repaid following the unsuccessful activity by Mr Hart.

[47] In the letter of engagement, dated 28 April 2006, the sum of $15,000 is expressed to be a "retainer" to "meet the cost of the legal services provided by Mr Hart and LT in assessing the apparent medical deficiencies in the diagnosis and treatment of [RI's daughter]". The letter subsequently provides that:

> Once the assessment process is complete Mr Hart, assisted by [LT], will be prepared to look at a **contingency fee** for completion of the process. Mr Hart

[1] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55.

> and [LT] will then discuss with you and your husband the details for payment of the contingency fee.

[48] It is quite clear from this letter of engagement that the money paid was to be applied to the legal services provided by Mr Hart in completing the assessment and that thereafter, a further fee would be payable which Mr Hart and LT were willing to consider would be on a contingency basis.

[49] I therefore concur with the Standards Committee decision in this regard.

The complaints

[50] The Standards Committee considered RI's complaints in the terms expressed by her. These were:

1. Whether Mr Hart failed to adequately represent [RI and her daughter];
2. Whether Mr Hart acted in [RI's daughter]'s best interests;
3. Whether Mr Hart failed to initiate proceedings on behalf of [RI's daughter]; and
4. Whether Mr Hart misled the complainant regarding legal services.

[51] The Standards Committee considered the following elements within the first two issues:

1. Failure to adequately represent
    a. that Mr Hart did nothing for four and a half years
    b. that Mr Hart had done no valid assessment
    c. that Mr Hart did not work on or understand the case
    d. that Mr Hart knew that RI was not aware of the relationship between ACC and civil proceedings and failed to advise her.
2. Whether Mr Hart acted in RI's best interests
    a. that Mr Hart rarely responded to RI's emails on time
    b. that Mr Hart did not give any valid reasons for failing to give legal advice and achieve the desired outcomes

c. that Mr Hart wanted to engage separate advice from a civil litigator

d. that Mr Hart did a deal with other parties.

3. That Mr Hart failed to initiate proceedings

4. That Mr Hart misled RI regarding legal services. This related to the basis for the payment of the $15,000.

[52] An alternative manner of addressing or categorising the complaints may have been to consider which rules of the Lawyers and Conveyancers Act (Conduct and Client Care) Rules 2008 applied. The Rules which I consider are relevant to RI's complaints are as follows:

> 3 – Lawyer to act competently and in a timely manner.
>
> 3.2 – Lawyer to respond to inquiries in a timely manner.
>
> 3.3 – Lawyer to advise if there are material and unexpected delays.
>
> 4.2 – Lawyer to complete regulated services required.
>
> 5.1 – Relationship between lawyer and client one of confidence and trust.
>
> 7 – Lawyer to promptly disclose all information.
>
> 7.1 – Lawyer to take reasonable steps to ensure client understands nature of retainer and to keep client informed about progress.
>
> 7.2 – Lawyer to promptly answer requests for information.
>
> 10 – Lawyer to promote and maintain proper standards of professionalism.
>
> 11 – Lawyer's practice must be administered so that reputation of the legal profession preserved.
>
> 13 – Lawyer has duty to act in the best interests of client.
>
> 13.3 – Lawyer to obtain and follow client's instructions after client is informed of the nature of the decisions to be made and their consequences.

[53] A consideration of the complaints and the material supplied by the parties results in a more focused consideration of the issues. Notwithstanding that the Notice of hearing issued by the Standards Committee dated 27 April 2011 was expressed in the terms recorded in [50] above, rather than in relation to the Rules identified by me, the issues to be addressed remain the same and Mr Hart has made full submissions in relation to these.

The applicable law

[54] Before embarking on a consideration of the Conduct and Client Care Rules and their applicability to Mr Hart's conduct, it is important to note that much of the conduct complained of took place prior to 1 August 2008. That is the date on which the Lawyers and Conveyancers Act 2006 came into force. In respect of conduct prior to this date, the provisions of section 351 of the Act need to be considered.

[55] Section 351 provides as follows:

> (1) If a lawyer … is alleged to have been guilty, before the commencement of this section, of conduct in respect of which proceedings of a disciplinary nature could have been commenced under the Law Practitioners Act 1982, a complaint about that conduct may be made, after the commencement of this section, to the Complaints Service established under section 121(1) by the New Zealand Law Society.

[56] The relevant standards are set out in sections 106 and 112 of the Law Practitioners Act 1982. Those sections provide that disciplinary sanctions may be imposed where a practitioner is found guilty of misconduct in his professional capacity, conduct unbecoming a barrister or solicitor or if the practitioner is guilty of negligence or incompetence of such a degree or so frequent as to reflect on his fitness to practice as a barrister or solicitor. Further guidance can be obtained from the Rules of Professional Conduct for Barristers and Solicitors which were the applicable rules at the time in question.

[57] The threshold for disciplinary intervention under the Law Practitioners Act 1982 is therefore relatively high. Misconduct is generally considered to be conduct of sufficient gravity to be termed "reprehensible", "inexcusable", "disgraceful", "deplorable" or "dishonourable". If the default can be said to arise from negligence, the negligence must be either reprehensible or be of such a degree or so frequent as to reflect on a practitioner's fitness or practice[2].

[58] Conduct unbecoming is perhaps a slightly lower threshold. The test will be whether the conduct is acceptable according to the standards of "competent, ethical and responsible practitioners"[3]. In that judgment, Elias J stated that "there is little authority on what comprises "conduct unbecoming". The classification requires assessment of degree. But it needs to be recognised that conduct which attracts

[2] *Atkinson v Auckland District Law Society* NZLPDT, 15 August 1990; *Complaints Committee No 1 Auckland District Law Society v C* [2008] 3 NZLR 105.
[3] *B v Medical Council* [2005] 3 NZLR 810 at 811.

professional discipline, even at the lower end of the scale, must be conduct which departs from acceptable professional standards. That departure must be significant enough to attract sanctions for the purposes of protecting the public. Such protection is the basis upon which registration under the Act, with is privileges, is available. I accept the submission of LQ that a finding of conduct unbecoming is not required in every case where error is shown. To require the wisdom available with hindsight would impose a standard which it is unfair to impose. The question is not whether error was made but whether the practitioner's conduct was an acceptable discharge of his or her professional obligations."[4]

[59] It is against these standards that Mr Hart's conduct prior to 1 August 2008 must be measured. Subsequent to that date, the applicable standards are those established by the Lawyers and Conveyancers Act and the Conduct and Client Care Rules.

The retainer

[60] Mr Hart's instructions, as recorded in the letter of engagement were to assess:

> ...the apparent medical deficiencies in the diagnosis and treatment of [RI's daughter].
>
> The assessment will involve:
>
> i. Identifying the nature of medical deficiencies, in particular those described as fundamental, and their legal implications;
>
> ii. Assessing likely causes of action against MS, KR and/or CBA;
>
> iii. Evaluating likely options, including outcomes;
>
> iv. Consultations with [RI] as required (by telephone, letter, fax or email);
>
> v. formulating in consultation with [RI] a strategy for any further action and determining the course to be followed.

[61] The medical deficiencies, as alleged by RI, were identified from the outset. What was required was to obtain evidence to substantiate the allegation that the punch biopsy taken from RI's daughter was mistaken for a punch biopsy taken from another woman. RI already had such evidence from three other laboratories. Mr Hart's actions were focused on obtaining further evidence to support this contention from a laboratory with international credibility, but nothing was achieved in this regard.

[62] Notwithstanding this, Mr Hart expressed confidence that "we had a good case"

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[4] Ibid, at 811.

and that civil proceedings should be instituted. Only draft generic proceedings were prepared and no proceedings were filed.

[63] It is hard to see that Mr Hart has fulfilled the obligations imposed by Rule 3 to provide the services in a timely manner, consistent with the terms of the retainer. There were times when Mr Hart did not promptly answer requests for information or other enquiries by RI (Rule 7.2). There was no comprehensive summary of the position or advice provided to RI to enable her to provide informed instructions in terms of Rule 13.3 and in generally failing to progress the proceedings, Mr Hart did not act in the best interests of RI and/or her daughter (Rule 13) or generally protect and promote his client's interests.

[64] In failing to make any progress in respect of RI's instructions for a period of four and a half years (which involved periods of nearly one year in total when nothing was done at all), Mr Hart has failed to promote and maintain the standards of professionalism breaching Rule 10.

[65] Although Mr Hart and LT appear to have complied with Rule 3.3 in advising RI of the ongoing delays being occasioned in progressing this file, the main reasons provided were that they were otherwise occupied. This destroyed RI's trust and confidence in them (Rule 5.1) and did nothing to enhance the reputation of the legal profession (Rule 11). It is difficult to see why RI would be interested in the details of the trials and other matters in which they were engaged when her own matters were not being attended to.

[66] The nature of the emails were often self serving and although acknowledging on a number of occasions that they were aware that RI's matters were not being progressed, one gains the overall impression that much of the activity that did occur was designed to give the impression that some activity was occurring on the file, when in reality little of substance was being achieved. I consider for example, that the draft Statement of Claim was little more than a generic document. RI asserts that it was based largely on a document prepared by her, and I note that it includes a claim for both compensatory and exemplary damages. If RJ's advice to RI is correct, then whether or not RI's daughter had ACC cover would dictate what could be claimed. Given that it would appear that she had not at that stage lodged a claim, it is difficult to see how a damages claim could be formulated at this stage.

[67] It is evident that Mr Hart did not complete the services for which he had been

retained (Rule 4.2) and there were certainly occasions when there were delays in providing information to RI (Rule 7). Reference to the email correspondence annexed to this decision will provide evidence of that.

[68] In a number of ways, therefore, Mr Hart has breached a number of the Conduct and Client Care Rules. Section 12(c) of the Lawyers and Conveyancers Act provides that this constitutes unsatisfactory conduct. In addition, section 12(a) defines unsatisfactory conduct as "conduct of the lawyer … that occurs at a time when he … is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer."

[69] With regard to the conduct prior to 1 August 2008, the definition of unsatisfactory conduct in section 12(b) is relevant in that it defines unsatisfactory conduct as including conduct unbecoming or unprofessional conduct.

[70] On a number of counts, therefore, I consider that Mr Hart's conduct, both prior to 1 August 2008 and subsequent to that date, constitutes unsatisfactory conduct. In reaching this decision I have addressed the issues in the same manner in which they were addressed by the Standards Committee. The various Conduct and Client Care Rules to which I refer provide a touchstone against which to measure Mr Hart's conduct rather than introducing new issues in respect of which Mr Hart has not had the opportunity to comment.

[71] In reaching this decision, I have had due regard to the fact that LT has been responsible for a large part of the conduct about which RI complains. However, Mr Hart was the person who RI consulted and who was named in the Letter of Engagement as the person instructed by her and to whom the payment of $15,000 was made. Mr Hart has not suggested in any of his submissions that he was not the person who had overall responsibility for the matter, and indeed resumed direct control of the matter following RI's complaint about the lack of progress in February 2008. I therefore consider that Mr Hart had responsibility for the file and for the conduct of LT.

[72] I have given serious thought whether or not charges should be laid against Mr Hart before the Lawyers and Conveyancers Disciplinary Tribunal. Mr Hart's conduct in representing RI offends against the purposes of the Lawyers and Conveyancers Act which are to maintain public confidence in the provision of legal services and to protect

the consumers of legal services.[5] However, I have determined to conclude the matter in this decision, if for no other reason than to bring some finality to this for RI and her daughter.

Penalty

[73] In her review application, RI sought:

a. return of her funds ($15,000), together with loss of interest and inflation;

b. damages for loss of chance to sue as of right within the two-year period;

c. damages for the loss of chance to sue within six years with the leave of the Court (prevented by lack of funds);

d. compensatory and exemplary damages;

e. costs of specimen storage for four and a half years; and

f. a general claim for damages.

[74] She also requests orders from the LCRO with regard to supervision of the slide and files handover that are beyond the jurisdiction of the LCRO. Indeed, it does seem that RI considers that this Office has jurisdiction akin to the Court with regard to the power to order payment of damages. That is not the case.

[75] In considering what penalties to impose, I am mindful of the provisions of section 352 of the Lawyers and Conveyancers Act which provides that any penalties imposed in respect of conduct prior to 1 August 2008 must be a penalty that could have been imposed in respect of that conduct at the time when that conduct occurred. It is difficult and somewhat artificial, however, to separate the conduct prior to 1 August 2008 from subsequent conduct. I intend to make orders pursuant to section 156 of the Lawyers and Conveyancers Act and to the extent that any of these Orders are not Orders that could have been made under the Law Practitioners Act 1982, then such Orders relate to conduct post 1 August 2008. Otherwise, the Orders relate to conduct both before and after that date.

[76] In considering whether there should be an order that Mr Hart reduce his fees, I acknowledge that I have not called for, (nor has it been provided by Mr Hart) any

[5] Section 3.

evidence in the nature of time records or files to enable me to review that extent of the work carried out on this file. However, one of the factors to be taken into account when assessing what constitutes a fair and reasonable fee, is the result achieved. I have already expressed my views in that regard. It is difficult to ascertain what has been achieved for RI. When considering what constitutes a fair and reasonable fee it is necessary "to take a step back and assess the fee in the round."[6] I have therefore adopted a somewhat "broad brush" approach in determining that Mr Hart's fees should be reduced to $5,000 (including GST).

[77] Section 156(d) of the Lawyers and Conveyancers Act 2006 provides for compensation to be paid to a complainant where a person has suffered loss by reason of any act or omission of a lawyer. Emotional stress has been recognised by this Office as a compensatable form of loss.[7] The ability to compensate for anguish and distress in the lawyer/client relationship has been recognised in a number of cases[8] and given the purpose of the Lawyers and Conveyancers Act (which in section 3(1)(b) includes the protection of consumers of legal services) it is appropriate to award compensation for anxiety and distress where it can be shown. The anxiety and distress suffered by RI is self evident from a reading of the correspondence from her. The alleged mix up in the biopsies resulted in her daughter undergoing what she considers was an unnecessary medical procedure. The anxiety and distress caused when what she considered was the date by which proceedings needed to be lodged came and went was considerable. In addition, the fact that she was not disabused of her misunderstanding added significantly to her distress. The maximum amount of compensation that can be ordered pursuant to section 156(1)(d) is $25,000.[9] An award for distress and anxiety is not punitive in nature but compensatory[10] and should be modest but not grudging. I have taken all of these factors into account when assessing an award of $5,000 to RI under this section.

Decision

(1) Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is reversed.

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[6] *Chean & Luvit v Kensington Swan* HC Auckland CIV 2006-404-1047, 7 June 2006.
[7] See e.g. *Hartlepool v Basildon* LCRO 79/2009.
[8] See e.g. *Heslop v Cousins* [2007] 3 NZLR 679.
[9] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees Regulations 2008, reg 32.
[10] *Air New Zealand Ltd v Johnston* [1992]1 ERNZ 700.

(2) By virtue of sections 12(a), (b) and (c) of the Lawyers and Conveyancers Act 2006 Mr Hart's conduct constitutes unsatisfactory conduct.

(3) Pursuant to section 156(1)(b) Mr Hart is censured.

(4) Pursuant to section 156(1)(d) Mr Hart is ordered to pay the sum of $5,000 to RI by way of compensation for distress and anxiety

(5) Pursuant to section 156(1)(e) Mr Hart is ordered to reduce his fees to $5,000 as representing the value of the work carried out for RI. To give effect to this Order Mr Hart is ordered to refund the sum of $10,000 to RI pursuant to section 156(1)(g).

Costs

Having found that Mr Hart's conduct constituted unsatisfactory conduct, an Order for Costs in accordance with the Costs Order Guidelines issued by this Office is appropriate. I also refer to the comments in [4] to [16] above. This review was of average complexity. Administration of the review was made particularly difficult by the lack of co-operation from Mr Hart. In the circumstances, it is appropriate that an Order for costs to the maximum extent set out in the Guidelines be made. Accordingly, pursuant to section 210(1) of the Lawyers and Conveyancers Act 2006 Mr Hart is ordered to pay the sum of $2,400 to the New Zealand Law Society within one month of the date of this decision.

Publication

Section 206(4) of the Lawyers and Conveyancers Act provides that the Legal Complaints Review Officer may, subject to subsection (3), direct such publication of decisions as he considers necessary or desirable in the public interest. Publication Guidelines are available on the LCRO website. In accordance with established principles, publication of the practitioner's name or identifying details of this decision will not be made without first receiving submissions from the parties. I therefore request submissions from the parties as to whether publication of this decision and the practitioner's name should be made, such submissions to be received within one month of the date of this decision. On the expiry of the period of one month I will consider and issue my decision in respect of publication, taking into account submissions to hand at that time.

DATED this 13th day of July 2012

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O W J Vaughan
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

RI as the Applicant
Mr Barry Hart as the Respondent
The Auckland Standards Committee 1
The New Zealand Law Society