LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 046

Ref: LCRO 158/2019

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	**RL** Applicant
AND	**BN, TG and VK** Respondents

DECISION

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

Introduction

[1] Ms RL has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of the respondents, Messrs BN, TG and VK.

[2] There has been some considerable delay, for a variety of reasons, in having this decision available to the parties. I apologise to the parties for that delay.

Background

[3] Ms RL owned and operated a successful real estate business in [City 1]. The business operated under the [Company 1] banner.

[4] She decided to sell the business.

[5] There were two prospective purchasers that Ms RL was interested in selling her business to.

[6] She decided to sell her business to a [City 2] based firm, [Company 2] Ltd ("Co 2").

[7] As a condition of sale, Ms RL was to remain working in the business for a period of time. A remuneration package was negotiated.

[8] In 2015, [Co 2] issued summary judgment proceedings against Ms RL, seeking recovery of monies paid to Ms RL in the sum of approximately $165,000.

[9] The summary judgment proceedings were successfully defended. The matter was timetabled for progression to a full hearing.

[10] As the matter advanced, a decision was made to file a counterclaim.

[11] The matter was scheduled to proceed to trial in December 2016.

[12] The lawyers withdrew from acting for Ms RL shortly before the trial was to commence, on account of Ms RL's inability to pay her fees.

[13] A settlement was negotiated with [Co 2].

The complaint and the Standards Committee decision

[14] Ms RL lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 31 March 2018. The substance of her complaint was that:

(a) She had been provided with negligent advice by [JPBN] and advised to advance a counterclaim when that claim had little prospect of success.

(b) She had not been advised at commencement as to the potential cost of the proceedings.

(c) She had made request for a full account of time spent on her file, but this had not been provided.

[15] By way of outcome, Ms RL made request for [JPBN] to be investigated.

[16] Subsequent to filing her initial complaint, Ms RL expanded on her complaint in what she described as supplementary submissions. Ms RL submitted that the conduct investigation should include a consideration as to whether:

(a) prudent advice was provided to Ms RL at the outset; and

(b) whether [NKD] had met the obligations owed of a duty of care to Ms RL; and

(c) whether a change of initial advice was acceptable and if so, whether Ms RL should have been charged for advice initially provided to her, if that advice was incorrect or negligent; and

(d) whether what is described by Ms RL as bullying behaviour on the part of Mr BN should be considered to have met the threshold of establishing unsatisfactory conduct;

(e) whether, in abandoning[1] Ms RL prior to the scheduled four-day hearing, the lawyers had contributed to Ms RL's financial loss.

[17] In submissions filed in response to Committee's notice of hearing[2], Ms RL submitted that:

(a) the litigation strategy promoted by the lawyers was commercially unsound; and

(b) it was difficult to determine whether costs charged for discovery of documents was reasonable; and

(c) Ms RL was not provided with a stage by stage breakdown of costs; and

(d) fees charged for discovery presented as disproportionate; and

(e) if the matter had progressed to hearing, the fees charged would have exceeded the value of the claim being brought against Ms RL; and

(f) Ms RL did not consider that Mr TG was sufficiently competent to advance her case; and

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[1] The term abandonment is used by Ms RL to describe the lawyers refusal to continue to represent her in the proceedings, it being the lawyers view that their refusal to do so was precipitated by Ms RL's failure, over a period of time, to pay her outstanding accounts.

[2] In significant part those submissions traversed matters that had been addressed in earlier submissions filed.

(g) the overall result achieved in the context of a best case/ worst case scenario needed to be considered; and

(h) a competent lawyer would, following completion of the discovery phase in around August 2016, have recognised that the chances of Ms RL succeeding at trial were unlikely, and counselled her accordingly; and

(i) when [JPBN] advised in November 2016 of the "high probability" that Ms RL would lose her case, this presented as a dramatic change in the advice she had received to that date; and

(j) Ms RL could not understand why she had been charged significant fees beyond the stage of completing discovery, only then to be advised that her case had little prospect of success; and

(k) legal costs incurred by [Co 2] had been significantly less than those incurred by Ms RL.

[18] Ms RL brought her complaints against Mr BN, Mr TG and Mr VK.

[19] Mr VK joined [JPBN] as a director in May 2016, at which time [JPBN] commenced operating its legal practice under the name and style of [NKD] Ltd.[3]

[20] Mr TG was employed as a staff solicitor with [JPBN] (and when that firm evolved into [NKD] Limited) up until February 2017.

[21] Mr BN, in responding to both the initial and supplementary complaint, submitted that:

(a) costs charged by [JPBN] Limited were fair and reasonable; and

(b) Ms RL was provided with estimates at various stages of her dispute with [Co 2]; and

(c) the summary judgement proceedings were successfully defended; and

(d) Ms RL had been advised that proceeding to trial would be expensive and carry a reasonable amount of risk; and

(e) Ms RL had been advised that her prospects of success were dependant upon her being able to support her assertions with evidence; and

[3] In the course of this decision I will reference respondents either by individual name, or collectively as "the lawyers", "[JPBN]", or "the firm".

(f) Ms RL had been advised that she faced prospect of some evidential hurdles; and

(g) [JPBN] Limited had been specifically instructed by Ms RL to continue advancing her case until October 2016, with expectation that the other side would settle; and

(h) Ms RL had been unable to provide the evidence necessary to bolster her case, indeed some of the evidence she provided was unhelpful to her cause; and

(i) Ms RL had been informed at commencement that there was a significant risk that [Co 2]' claim would be successful; and

(j) Ms RL had elected to continue with her defence and counterclaim for commercial reasons, and

(k) Ms RL had been provided with a fee estimate; and

(l) Ms RL had been resistant to providing documentation required for discovery; and

(m) a number of witnesses who Ms RL had advised would provide evidence to support her case provided evidence which did not support Ms RL's account of events, or refused to provide evidence on Ms RL's behalf; and

(n) Ms RL provided frequent assurances that she would settle outstanding fees, but then neglected to do so; and

(o) Ms RL was advised in October 2016 of the revised cost estimate for proceeding to trial, and informed of the need for her to make arrangements to ensure payment of costs; and

(p) Ms RL failed to respond to that request until late November 2016; and

(q) Ms RL had been provided with competent and realistic advice throughout; and

(r) the scope of the initial advice given to Ms RL was not, as alleged by Ms RL, to encourage her to litigate, but rather to defend the summary judgment application and;

(s) the advice tendered to Ms RL had not changed during the course of the retainer; and

(t) fees rendered to Ms RL were monitored by the supervising partner and at all times, responsibility for fees charged rested with the partner; and

(u) the difficulties of accurately calculating costs in advancing litigation were explained to Ms RL at the outset; and

(v) Ms RL had failed to identify anything objectionable in the time records provided; and

(w) both attending to discovery and briefing of witnesses had taken considerable time; and

(x) Ms RL had been uncooperative in providing information to the accountant briefed to provide evidence on her behalf at trial; and

(y) Ms RL had been advised that her uncooperative attitude to completing discovery was resulting in her costs significantly increasing; and

(z) the proceedings were reasonably complex; and

(aa) Ms RL had instructed that an acceptable outcome for her would be to delay any payment having to be made to [Co 2] until October 2016; and

(bb) Ms RL had been kept fully informed as to the position with her fees throughout the course of the retainer.[4]

[22] The Standards Committee charged with completing the investigation into the conduct complaints distilled the focus of its inquiry as being an inquiry into whether the fees charged by [JPBN] were fair and reasonable, with particular focus on the question as to whether fees charged were excessive when considered alongside the outcome achieved.

[23] The Standards Committee delivered its decision on 23 September 2019.

[24] The Committee determined, pursuant to s 138(2) and 152 (2)(c) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[4] In summarising the Lawyer's submissions I have considered both the submissions filed in the course of progressing the complaint, and the final submissions lodged following receipt of the Committee's notice of hearing.

[25] In reaching its decision to take no action on Ms RL's complaints, the Committee concluded that:

(a) an assessment of the fee properly required a consideration of the costs incurred in advancing the counterclaim; and

(b) Ms RL had been informed as to the difficulties she would face in advancing her case at commencement; and

(c) she had been provided with a reasonable estimate of likely costs at commencement, and kept informed on costs during the course of the retainer; and

(d) it could identify no issues with the time records, nor could it identify any areas where those records would indicate that work had been done that did not need to be done; and

(e) Ms RL had achieved some success particularly when her initial instructions were considered; and

(f) fees charged for completion of discovery were reasonable, particularly when measured against the uncooperative approach Ms RL had adopted to providing the lawyers with documentation; and

(g) allegations of bullying were unsupported.

(h) no issues arose from the manner in which Ms RL's retainer was terminated.

[26] In concluding its decision, the Committee noted that in focusing, as it had, on the question as to whether fees charged were fair and reasonable, it was satisfied that the additional allegations made by Ms RL were either unsupported by the evidence provided, or did not raise any issues of professional responsibility requiring disciplinary action.

[27] The Committee noted that it included amongst its membership, four Committee members who had relevant experience in litigation, this to explain its decision not to engage a costs assessor to examine the fees.

Application for review

[28] Ms RL filed an application for review on 27 October 2019. The outcome sought is relief from all, or part of, the outstanding fees owed by Ms RL.

[29] Ms RL submits that:

(a) Ms RL had not been advised of the litigation risk she faced.

(b) fees charged were excessive.

(c) the Committee's conclusion that the overall merits of the counterclaim only became apparent after the completion of discovery was incorrect, the firm only changing its stance when Mr VK became involved.

(d) the Committee's conclusion that the estimate of $80,000 was acceptable was manifestly wrong.

(e) the cost incurred in completing discovery (calculated by Ms RL to translate to $270 per document) was "staggeringly high".

Hearing

[30] Both parties attended a hearing on Friday 19 June 2020.

[31] Following the hearing, Mr BN filed submissions with the LCRO expressing concern that the scope of the review hearing had extended beyond what had been contemplated, it being his understanding that the matters addressed at review would be confined to examining the issue which the Committee had identified as being the focus of its inquiry, being the question as to whether fees charged were fair and reasonable.

[32] In response to those submissions, I issued a minute in which I recorded that I considered that the scope of the review was to address all the grounds of complaint. Further, I indicated in that minute that Ms RL's application for review identified a range of issues that she wished the Review Officer to address and that the submissions filed by the lawyers in response to Ms RL's review application gave clear indication that the lawyers were aware that Ms RL's application was challenging the Committee's decision from a broader perspective than a mere examination as to the reasonableness of the fees.

[33] The file received from the Standards Committee was extensive.

[34] On the file, were a number of memorandums and directions issued by the Committee. The Committee noted that it had considered Ms RL's complaint on no fewer than four occasions.

[35] Whilst I had carefully perused the submissions filed by the parties prior to the hearing, I had not had opportunity to look closely at all of the Committee's minutes and memorandums. Once I had an opportunity to do so (and I will be commenting on the Committee's process later in this decision) it became apparent that the Committee had made decisions in respect to a number of the issues of complaint raised by Ms RL prior to issuing its final notice of hearing. That notice of hearing identified the issues on which it required a final response from the parties as being an examination of the question as to whether the fees charged were fair and reasonable.

[36] Approached from that perspective, it was understandable that the lawyers may have formed the view that the issue to be addressed on review would be focused on the question of the reasonableness of the fees.

[37] That said, in providing (as they sensibly did) broad response to the raft of issues raised by Ms RL, and in providing further submissions following the hearing, I am satisfied that the lawyers (and Ms RL) have had abundant opportunity to present their positions.

[38] The submissions filed have been comprehensive.

Nature and scope of review

[39] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[5]

> … 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.

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

[40] More recently, the High Court has described a review by this Office in the following way:[6]

> 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.

[41] 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.

Discussion

[42] The issues to be addressed on review are:

(a) Did the Standards Committee adequately address the issue which was central to Ms RL's complaints?

(b) Were Mr BN's interactions with Ms RL reflective of him having adopted a bullying approach?

(c) Did the lawyers properly inform Ms RL of the risks involved in litigating her claim, and adequately monitor the merits of her case through the course of the evolving litigation so that she was informed at the earliest opportunity that her case had little prospect of success, this enabling her to withdraw from the litigation so as to avoid incurring unnecessary legal costs?

(d) Did the lawyers terminate the retainer without good cause?

(e) Were the fees charged fair and reasonable?

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

Did the Standards Committee adequately address the issue which was central to Ms RL's complaints?

[43] When Ms RL first engaged [JPBN], her instructions were to defend summary judgment proceedings involving a claim of approximately $165,000.

[44] A decision was made to advance a counterclaim. Question as to whether that decision was made by Ms RL, or a decision taken by Ms RL on the recommendation of Mr TG, is contested.

[45] In total, Ms RL incurred fees of $105,291 (exclusive of GST and office expenses).

[46] This settlement agreement with [Co 2], required her to make payment to [Co 2] in the sum of $220,000.

[47] These costs were incurred by Ms RL in defending an initial claim of $165,000

[48] Ms RL's complaints took some time to wind their way through the Standards Committee's inquiry process.

[49] In a memorandum issued on 29 January 2019, the Committee noted that it considered the substance of the complaints on 31 October 2018, and resolved to inquire further into the complaints.

[50] When issuing its notice of hearing, the Committee identified the focus of its inquiry as being whether fees charged by [JPBN] were fair and reasonable.

[51] When delivering its decision, the Committee addressed the issue as to the reasonableness of the fees charged, not by simple reference to a consideration as to whether the fees charged reflected work that had been completed on the file, but by reference to issues including:

(a) the standard of service provided; and

(b) an assessment as to the reasonableness of the estimate provided; and

(c) whether Ms RL had instructed the lawyers to progress a counterclaim; and

(d) whether [JPBN] had adopted a strategy that increased Ms RL's costs; and

(e) whether fees charged to complete discovery were reasonable.

[52] The critical element of Ms RL's complaint, was concern that the lawyers had not kept her properly informed as to the problems she would encounter with her counterclaim and concern that she had been encouraged to pursue litigation which had little prospect of success.

[53] The foundation for Ms RL's pivotal concern, was the starkly confronting realisation that she had spent over $100,000 in defending a claim of $165,000 (her costs including advancing a counterclaim), had been unable to progress the matter to trial, and in the absence of negotiating strength, had to settle the initial claim of $165,000, by payment to [Co 2]of $220,000.

[54] It would have been preferable for the Committee to have identified both in its notice of hearing, and in its decision, that the critical issue of Ms RL's complaint was allegation that [JPBN] had failed to competently advise her during the course of the litigation, as a consequence of which she had incurred costs staggeringly disproportionate to the outcome achieved.

[55] If the Committee had focused attention on this issue in its decision, Ms RL may have felt that her primary concern had been more comprehensively addressed.

[56] But I am satisfied that whilst the Committee elected to approach its inquiry by framing the inquiry as an investigation into the fees charged, that inquiry embraced a consideration of the question as to whether [JPBN] had driven the litigation with insufficient regard to potential for serious adverse outcome for Ms RL.

Were Mr BN's interactions with Ms RL reflective of him having adopted a bullying approach?

[57] No.

[58] In disciplinary terms, an allegation of bullying behaviour by a lawyer towards their client translates into a breach of r 10.

[59] Mr BN was not the director that had responsibility for the management of Ms RL's case.

[60] That responsibility rested initially with Ms JP (a Director of the firm) and Mr TG (an associate).

[61] In June 2016, Mr VK took over responsibility for oversight of the file.

[62] To the extent that Mr BN was engaged with the file, his involvement was primarily in dealing with Ms RL over issues relating to the payment of outstanding fees.

[63] Mr BN corresponded with Ms RL over several months. It was he who advised Ms RL of his firm's unwillingness to continue acting for Ms RL.

[64] I have carefully scrutinised Mr BN's correspondence.

[65] That correspondence is clear and unequivocal in its purpose of explaining to Ms RL that his firm would be unable to continue to represent Ms RL if satisfactory arrangements could not be made for outstanding fees to be settled. As the hearing approached, Mr BN made request for all outstanding fees to be paid, and for funds to be deposited to a solicitor's trust account to cover the costs of the impending trial.

[66] Whilst Mr BN's correspondence is firm and on occasions approaches the robust, I do not consider that it ever crosses the line into the discourteous. It certainly cannot, in my view, fairly be described as bullying in either tone or content.

[67] Ms RL's financial circumstances had been significantly compromised by the failure of her business venture with [Co 2] to work out as had been anticipated.

[68] She was, as is the case with many who become involved in court litigation, having difficulty coping with her escalating legal costs. Problems with her settling monthly accounts were identified early in the piece. In March 2016, [JPBN]'s practice manager wrote to Ms RL to advise that "[d]espite repeated assurances from you that payments would be made on particular dates, this has either not occurred at all, or only occurred once we have contacted you pressing for an update, with payments often been less than promised". The practice manager goes on to caution Ms RL, that "if we do not hear from you or payment is not forthcoming, we will need to consider our options regarding undertaking further work for you".

[69] Mr BN wrote to Ms RL in early June 2016, making request of her to submit a proposal for payment of her accounts.

[70] On 23 June 2016, he advised Ms RL that the irregular payments she was making towards settlement of her account were inadequate, and that arrangements would need to be made to explore alternative ways of meeting outstanding fees or providing security. In what was to become a familiar refrain, Mr BN cautions Ms RL, that "unless this is to happen we will have no alternative but to terminate our solicitor client relationship. We do not want to have to take these steps, but it is clear to us that payment

of our fees is not a priority for you and this is not a situation that we are willing to allow to continue."

[71] Mr BN wrote to Ms RL in similar vein, in July 2016, October 2016, and on a number of occasions in November 2016.

[72] Ms RL's consistent response to Mr BN's requests was to take steps to ensure that some funds were deposited to the firm's account (though not always in the sum requested) and to give indication that she was doing her best to manage the fees.

[73] It was only at the point in mid-November 2016 when she received indication of the requirement to have all arrears cleared, and for a significant sum to be paid into a solicitor's trust account, to cover impending costs of trial, that Ms RL raised concerns about fees.

[74] It is not surprising that Ms RL would (as she did) consider that Mr BN's correspondence of 23 November 2016, in which he advised that his firm would no longer be prepared to represent her at the hearing, presented as an unfortunate end to the litigation.

[75] But, viewed in their totality and considered in their context, I do not consider that Mr BN's repeated attempts to have Ms RL's financial arrangements with his firm put on a firm footing, merit description of them as bullying in nature.

Did the lawyers properly inform Ms RL of the risks involved in litigating her claim?

[76] As noted, the pivotal issue for Ms RL was complaint that she expended tens of thousands of dollars in legal costs, only to be advised at relatively last minute, that her claim had little prospect of success.

[77] It is complaint that is overarched with apparent paradox that a litigant would, over a period of months, spend in excess of $100,000 in legal costs defending a claim of $165,000 through a strategy of advancing a significant counterclaim, only to be advised a month out from hearing that their claim had little prospect of success and that they would be strongly advised to settle the claim against them. Further, the litigant is advised that their lawyer is no longer prepared to represent them. The opportunity for a litigant who has had difficulty in meeting legal costs of acquiring fresh counsel in a short period of time to represent them in a trial anticipated to take place over 4-5 days, with several witnesses required to be called, is remote. If salt is needed to be rubbed into what presents as a rather gaping wound, the litigant, faced with little option but to attempt

settlement, not surprisingly finds themselves in an immeasurably weakened negotiating position and is forced to settle a claim of $165,000 by payment of $220,000.

[78] It is an outcome which, viewed in purely commercial terms, can only be described as disastrous for Ms RL.

[79] There are several threads to this element of Ms RL's complaint.

[80] She contends that she was provided with an initial estimate that informed her that costs to completion would be in the region of $80,000.

[81] She argues that she was encouraged by Mr TG to advance a substantial counterclaim with little understanding of what that would involve.

[82] She maintains that her lawyers failed to keep her informed.

[83] At hearing, Ms RL argued that she had been severely traumatised by her experience in working with the [Co 2] franchise and was vulnerable and not well placed to cope with the litigation. She considered that her lawyers had failed to adequately protect her and guide her through the litigation with careful and considered advice.

[84] Against this, it is argued for the lawyers that they had been successful in achieving what Ms RL had set out to achieve, namely to delay [Co 2]'s claim until October 2016 in order to provide opportunity for Ms RL to garner her resources and to avoid any prospect of an adverse court finding which would have had consequences for her professional reputation. It was the lawyers' view that Ms RL had been consistent in her position that she wished to pursue her counterclaim and had retained a continuing confidence that [Co 2] would not wish for the matter to proceed to trial.

[85] Whilst I consider that both Ms RL and the lawyers were genuine and honest in advancing their positions, I did not consider that the accounts provided by either provided complete explanation as to why the retainer took the course it did.

[86] I accept that Ms RL experienced considerable distress as a consequence of the failure of her agreement with [Co 2] to work out, and it is well understood by lawyers entrusted with the responsibility of guiding clients in litigation before the court that the process can be, and frequently is, extremely stressful for their clients.

[87] But I do not consider that Ms RL's account of herself, as being ill equipped to manage the travails of the litigation, provides full account of her circumstances.

[88] Ms RL was an experienced and competent [AB] agent. She had consistently, over a number of years, achieved success as a top agent in the [City 1] [AB] business. Her annual commission earnings were significant.

[89] [AB] agents operate in a highly competitive environment. Their business is, by its nature, transactional. To be successful, as Ms RL clearly was, they must possess an ability to understand contracts, a capacity and skill for negotiation, a facility for meeting deadlines and an aptitude for dealing with people in what are, not infrequently, periods of high stress.

[90] Ms RL would have had considerable experience in dealing with lawyers.

[91] Whilst I do not diminish or make light of the fact that Ms RL was suffering considerable stress as a consequence of becoming embroiled in a dispute with [Co 2], I am not persuaded that her circumstances were such that she was significantly compromised in her ability to understand the steps that were being taken in the litigation.

[92] But I do not consider that the lawyers having, as they have emphasised, received initial instructions from Ms RL that her objective was to fend off a possible judgment and to prolong the proceedings in anticipation that [Co 2] may abandon their claim, were absolved of the responsibility to monitor the escalating costs, and to ensure that Ms RL was alerted to the obvious risk of her incurring substantial legal costs in circumstances where there was strong possibility that her claim had little prospect of success.

[93] Argument to support a strategy focused on delay, would carry most weight at the commencement of the proceedings, particularly when the objective was to fend off the summary judgment application. But with the decision to advance a counterclaim in the sum of $350,000, careful consideration to the costs of advancing that counterclaim, and the potential cost risks, would have needed to be clearly identified for Ms RL.

[94] Some time was taken by the Standards Committee in clarifying and identifying the issues it considered required investigation. Considerable efforts were made by the Committee to accommodate requests made of the lawyers by Ms RL for the lawyers to provide further information.

[95] It was perhaps unfortunate that Ms JP, the director who had first taken instructions from Ms RL, and who had been responsible for providing oversight of Ms RL's file for a considerable duration of the retainer, was not asked to comment on the complaint.

[96] Consequently, there was no evidence before the Committee from the lawyer who had primary responsibility for the management of the file during the critical period when instructions were provided.

[97] Nor did the lawyers seek to provide evidence from Ms JP, though Mr BN, in his response to the Standards Committee, did provide account of Ms JP's position and note that it was open to the Committee to seek information from Ms JP.

[98] Mr TG, in providing a submission to the LCRO following the hearing, confirmed that Ms JP had provided the initial advice.[7]

[99] Mr TG, in reflecting similar concern to that raised by Mr BN subsequent to hearing, advised that the Committee's direction to the parties that the inquiry would be primarily focused on issue as to whether the fees were fair and reasonable, shaped the lawyer's response to the review.

[100] Mr BN suggested that if he had been aware that issue as to the nature of the advice provided to Ms RL was to assume significance in the review, he would have provided an affidavit setting out details of the advice given including advice provided in multiple phone conversations with Ms RL.

[101] He observed that Mr BN had, in correspondence to the LCRO of 19 November 2019, made observation that Ms RL's complaint, as refined by the Committee, appeared to be solely a fee complaint and that as Mr TG as an employee of the firm had no responsibility for setting fees, he should not be a subject of the complaint.

[102] Mr TG suggested that if the LCRO had responded to that submission with explanation that the review would not be confined solely to a consideration of the issue as to whether the fees charged were fair and reasonable, he would have taken a very different approach to the hearing.

[103] Mr BN's submission as to the extent of Mr TG's liability was precisely that: a submission.

[104] It is not the practice of the LCRO to respond piecemeal to submissions that are filed in the course of progressing a review.

[105] Nor was it the case that the Committee's focusing on the reasonableness of the fees in its notice of hearing, or the structuring of its decision by marshalling the various

[7] Mr TG, correspondence to LCRO (17 July 2020).

issues under the umbrella of a fee complaint, reflected a complete deflection from a consideration of the issue as to whether Ms RL had been competently advised.

[106] Nor was Mr BN oblivious to the fact that Ms RL's review application directly made criticism of what she considered to be a failure on the part of the Committee to address complaint that she had been poorly advised. Mr BN's review submissions, in addressing what he describes as each of the points raised by Ms RL, commence by addressing allegation that the firm had failed to provide advice regarding litigation risk. He goes on to respond to accusation that Ms RL was given poor advice on her counterclaim.

[107] It is surprising that Mr TG appears to have approached the review on the basis of an understanding that he would not be required to respond to allegation that Ms RL had not been competently advised, when the issue was so patently to the forefront of the concerns raised by Ms RL, and inextricably linked to the question as to whether fees charged were fair and reasonable.

[108] That said, I accept Mr TG and Mr BN's evidence that they consider Ms JP would corroborate their account of events.

[109] In his response to the Complaints Service of 19 June 2019, Mr BN advised that "Ms RL told Ms JP and Mr TG that, despite their advice about risk, she was adamant that she did not want to make any voluntary payment to [Co 2]. Her strong view was that [Co 2] would eventually cave and settle the matter in order to avoid the embarrassment associated with internal issues and failings becoming public at any hearing".

[110] Mr BN maintained that "Ms RL was advised of the risks and made an educated decision based on her assessment of [Co 2]'s likely approach. Ms RL therefore said that she wanted us to continue progressing her defence and counterclaim until after October 2016".

[111] I am satisfied that at the commencement of the retainer, the strategy discussed and agreed was to oppose the application for summary judgment, and to endeavour to "wear down" [Co 2]'s appetite for ongoing litigation.

[112] I am also satisfied, that when a decision was made to advance a counterclaim, that the implications and consequences of that decision were discussed with Ms RL, and that she was in agreement with the strategy proposed.

[113] Costs and prospects of successful outcome are the two issues that are commonly at the forefront of clients' minds when the possibility of progressing litigation through the court is being considered.

[114] On 28 January 2016, Ms RL wrote to the lawyers to enquire:

> Could you please let me know if you believe I do have a strong case, I do understand there is some risk to me also. I just want to know what approximate cost is involved, and we will be asking for repatriation for this cost incurred if found in favour for me.

[115] In providing advice to Ms RL on that same day, Mr TG advised Ms RL that:

> The potential benefit of this action is that [Co 2] may consider that you are serious about your claim and it is not just a negotiating tactic. The disadvantage is that if [Co 2] still considers that your claim is a negotiating tactic then a trial becomes probable. A trial is likely to be expensive and carries a reasonable amount of risk to you.

[116] Ms RL acknowledged that she understood that there was a risk in continuing with the litigation.

[117] A further risk/cost assessment was provided to Ms RL on 2 February 2016, when Mr TG advised Ms RL that:

(a) legal costs were difficult to estimate; and

(b) estimates were provided as a guide only.

[118] Mr TG identified potential difficulties that Ms RL may face in advancing her claim, particularly a risk that the court may conclude that an email Ms RL had forwarded to [Co 2] supported [Co 2]'s account of the arrangements it had entered into with Ms RL.

[119] A significant feature of Mr TG's correspondence of 2 February 2016, is that Mr TG reinforces that in the absence of a written contract which recorded the terms of the agreement between [Co 2] and Ms RL in terms as Ms RL understood them to be, it was critical for Ms RL, if she was to succeed with her claim, that she be able to establish to the necessary evidential standard, that her account of events was correct.

[120] In short, Mr TG was advising Ms RL that her evidence would have to come up to brief.

[121] I think it probable that Ms RL understood from the outset that the success or failure of her case depended on her being able to prove that [Co 2] had failed to honour representations made to her. She would have been acutely aware from commencement,

that [Co 2] would be vigorously denying that they had agreed to engage Ms RL on terms and conditions that Ms RL maintained had been agreed.

[122] Ms RL responded to Mr TG's overview with confirmation that the overview he had provided was "good and clear".[8] She confirmed that she was "currently favouring trial". A meeting was scheduled to discuss matters further.

[123] I am satisfied that Ms RL was informed, at commencement, of the risks involved in progressing her claim.

Did the lawyers adequately monitor the merits of her case through the course of the evolving litigation and properly inform her at the earliest opportunity that her case had little prospect of success, thus enabling her to withdraw from the litigation so as to avoid incurring worthless legal costs?

[124] These two issues are closely intertwined.

[125] As noted, at the crux of Ms RL's complaint was the concern that having expended a significant sum in legal costs, she had been advised shortly prior to her trial commencing that her claim had little chance of succeeding.

[126] Her view was that her lawyers should have advised her earlier in the piece that her claim faced substantial obstacles. If she had been informed earlier of the extent of the difficulties she faced with her claim, she would have been able to extricate herself from the proceedings.

[127] Ms RL overlays that concern with argument that the stress and anxiety that she had suffered as a consequence of becoming embroiled in the dispute with [Co 2], had made her especially reliant on receiving competent advice from her lawyers.

[128] Ms RL's trial was scheduled to proceed on 1 December 2016.

[129] On 4 November 2016, Mr TG wrote to Ms RL to advise that preparation of briefs had almost been completed.

[130] Mr TG informed Ms RL that he considered it "timely" for him to provide Ms RL with "some advice on the merits of [her] case".

[131] What followed was a careful and comprehensive analysis of the strengths and weaknesses of Ms RL's case.

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[8] Ms RL, email to [JPBN] (2 February 2016).

[132] Mr TG concluded that "there was a high probability the [Co 2] claim will be successful and your counterclaim will be unsuccessful".

[133] Mr TG advises Ms RL that she should "be giving serious thought now to making a confidential without prejudice settlement offer with a view to both avoiding the abovementioned risks and insulating yourself against the cost award in the event that your offer is rejected and you are ultimately unsuccessful at the hearing".

[134] I have noted that Mr TG's analysis was comprehensive. It clinically dissects each aspect of Ms RL's claim and identifies a multitude of problems she faces. It is difficult to see how any client receiving such a discouraging assessment as to the viability of their own case, in tandem with prediction that "there is a high probability" that their opponent's claim will be "successful," could realistically contemplate that it was viable to continue with the proceedings.

[135] Ms RL, understandably, was disconcerted to receive this advice.

[136] It was difficult for her to decide what to do.

[137] Her lawyers were seeking instructions from her as to whether she wished to continue.

[138] She had been advised that her case was hopeless, but at the same time, being pressed to clear her arrears and make arrangements to deposit a substantial sum of money to her solicitor's trust account, as security for costs. She was being warned (as she had been over a series of months) that if she failed to make satisfactory arrangements to ensure that fees would be paid, her lawyers would withdraw from acting.

[139] The intensely conflicting situation that Ms RL was facing, is graphically illustrated by a series of emails that were exchanged between herself and the lawyers on 16 November 2016.

[140] On 4 November 2016, Ms RL had been informed that her case was hopeless. Request was made of her to advise as to whether she agreed to the lawyers sending [Co 2] a Calderbank offer.

[141] On 16 November 2016 at 3:15 pm, Mr TG wrote to Ms RL to advise that "[t]he trial is two weeks away and preparations are progressing at full steam" and that "[w]e have not heard from you in regards to the Calderbank letter."

[142] On 16 November 2016 at 4:16 pm, Mr BN writes to Ms RL, expressing concern that she had not responded to his emails in which he had sought clarification as to how she would settle her accounts.

[143] At 6:19 pm on 16 November 2016, Ms RL writes to the lawyers, to advise that she is "[unsure] what to do". She says "I have a lot at risk and in hindsight would have done things differently. My concerns are that [Co 2] lie. My claim against them is very high therefore worth fighting for. I still believe they won't want the exposure however I could be wrong." At this juncture, Ms RL appears, despite having received advice that her case had little prospect of success, to be committed to proceeding with the trial. She advises that she has plans to make payment of $5,000 to outstanding costs, and is exploring the possibility of securing a bank loan.

[144] On 17 November 2016, Mr BN informs Ms RL that he requires her to provide confirmation from her bank (by 4pm the following day) that she has arrangements in place that will enable her to meet her fees.

[145] It is at this point, that the concerns that ultimately prompted Ms RL to file her complaints against the lawyers come to the fore.

[146] Ms RL responds to Mr BN expressing concern that after having expended around $62,000 of fees, her lawyers wish to withdraw from her case. She describes the approach adopted by her lawyers as "harsh" and begins to question the litigation strategy that she considered she had been encouraged to pursue on the advice of Mr TG. Ms RL expresses concern that "I was never informed from the outset about the level of costs that would be incurred by you to prepare my case". Despite these reservations, Ms RL advises that "I do expect you to continue your service to me until my case is finalised. I will like you to provide a breakdown of costs going forward commencing from today".

[147] On 21 November 2016, Mr VK (who at this point is the director carrying responsibility for oversight of the file) writes to Ms RL. In that correspondence, Mr VK reinforces that the lawyers consider that Ms RL's claim is hopeless. Mr VK informs Ms RL that:

> Our advice is that we think you are likely to lose the hearing and be forced to pay the amount that [Co 2] is claiming ($160K approx.), plus interest on that amount and court costs. You will also incur further liability to us in the form of our costs of preparing for attending the hearing. … If you lose the hearing (which we consider likely), you will be required to pay $160,000 plus interest … plus a contribution to [Co 2]'s legal costs … plus our costs …. Given the significant risk you are facing our recommendation is that you should be making real efforts to settle this matter to avoid the above-mentioned risks.

[148] Responding to pushback from Ms RL in which she had expressed concern that her case was now being presented as meritless, Mr VK wrote further to Ms RL on 22 November 2016. He informed Ms RL that it was "obviously not a certainty" that she would lose her case, but that it was important that she understood the significant risk of proceeding to trial. Mr VK left no room for doubt as to what his position was. He informed Ms RL that he considered that there was "a high probability that you will lose if the matter proceeds to a hearing".

[149] Despite forthright indication from her lawyers that they considered it would be unwise for Ms RL to continue, Ms RL was clearly inclined to do so. But her ability to progress her case was dependant on her being able to satisfy the lawyers that she had put in place arrangements that would ensure that her lawyers would be paid.

[150] By this point, the lawyers were requiring confirmation from Ms RL's bank that funds had been organised.

[151] On 23 November 2016, Ms RL received confirmation from her bank of a loan offer. The offer was conditional upon Ms RL satisfying a number of conditions.

[152] Ms RL forwarded the bank documents to Mr BN immediately.

[153] Mr BN responded to advise that Ms RL's indication of the steps taken to secure a loan were "simply too little too late". Mr BN informed Ms RL that the documentation received, did not "provide us with the comfort that we seek". Mr BN confirmed that the lawyers would be not be acting further, and that Ms RL would need to engage new counsel.

[154] The situation that Ms RL faced was clearly distressing for her.

[155] Having expended a considerable sum in legal fees, she had been advised at relatively last-minute, that there were major problems with her case.

[156] The financial implications of her having embarked on litigation that had minimal prospect of success, were compounded by the fact that she was faced with little option but to settle a claim of $165,000, which, when negotiations were completed, required her to make a settlement payment of $220,000.

[157] This was, as noted, a commercially disastrous outcome for Ms RL.

[158] A memorandum prepared for the Committee members, described the result "achieved" as in a sense problematic, but realistic in the circumstances.[9]

[159] The lawyers considered that Ms RL had enjoyed a degree of success. In response to criticism from Ms RL that she had incurred unnecessary costs for minimal return, Mr VK advised Mr RL that "[t]he fees you have spent with us will not have been wasted, as you put it. Rather, we have spent the last several months attempting to obtain sufficient information to bolster and support your claims against [Co 2]". Mr VK argued that "[t]he work we have done has allowed you to investigate and make an assessment of the likelihood of successfully defending [Co 2]'s claim and/or successfully bringing your own claim against [Co 2]".[10]

[160] I think it unlikely that Ms RL, if she had the benefit of prescient foresight at the commencement of the retainer, would have considered that the outcome achieved was satisfactory on the basis that it had provided her with opportunity of addressing the likelihood of her successfully defending or advancing claims.

[161] In responding to accusation that they had failed to competently advise Ms RL on the risks of litigation, the lawyers placed considerable reliance, as did the Committee, on Mr TG's correspondence to Ms RL of 2 February 2016, and argument that Ms RL's consistent instructions had been that her preparedness to prolong the litigation was motivated in large part by her desire to fend off the [Co 2] claim until such time as she was financially able to address possibility of settling the claim.

[162] Mr TG's initial advice sensibly alerted Ms RL to the litigation risks.

[163] It did more than simply provide predictable caution that litigation outcome cannot be guaranteed.

[164] Mr TG identified potential difficulties with establishing Ms RL's claim.

[165] But I do not consider that initial advice provided to a client at the commencement of a litigation retainer, inoculates a lawyer from the responsibility to carefully and regularly monitor the evolving litigation, and to promptly identify any issues, if and when they arise, that have potential to significantly undermine their client's case.

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[9] The memorandum is undated. The drafter of the memorandum inserted quote marks around the description of "achieved", this I assume to emphasise the apparent incongruity of describing the outcome in terms which suggested a degree of satisfaction with the result.

[10] Mr VK, correspondence to Ms RL (21 November 2016).

[166] It would be expected that a competent and diligent lawyer would immediately advise their client if issues emerged that persuaded the lawyer that there was a "high probability" that the client's case would not succeed.

[167] The critical question is whether the lawyers should have advised Ms RL earlier than they did, that there were significant obstacles with her claim.

[168] Mr TG's advice to Ms RL one month out from the trial commencing that he considered it timely to provide Ms RL with advice on the merits of the case, appears to have been advice that came late in the piece.

[169] Ms RL argues that the comprehensive assessment of her case that Mr TG provided on 4 November 2016 should have been carried out well in advance of the commencement of the trial.

[170] Ms RL's argument that she should have been informed that her case lacked a sound foundation well in advance of the proposed date for commencement of the trial presents at first blush as having merit, but a proper consideration of the question as to whether the lawyers failed in their obligation to keep Ms RL adequately informed as to the viability of her case, must, at first step, consider the particular nature of Ms RL's claim.

[171] It was Ms RL's contention that [Co 2] had failed to honour representations made to her when agreement was reached for [Co 2] to purchase her business.

[172] She was alleging that [Co 2] had represented to her that they would guarantee her a level of remuneration, that they would compensate her for commissions earned by other agents, that they would provide a constructive working environment, and importantly, that she would be assured of receiving the benefits of arrangements that [Co 2] would implement to create a working relationship with other [AB] agencies.

[173] This claim was dependent on Ms RL being able to establish that her account of the arrangements she said had been agreed with [Co 2] was accurate.

[174] Evidence is important in every civil case but in this one it was critical. Ms RL's claim was never going to succeed on the back of legal argument, it rested on her being able to persuade the court that [Co 2] had failed to honour representations that had been made to her.

[175] The importance of her evidence coming up to brief was highlighted in Mr TG's correspondence to Ms RL of February 2016.

[176] In addition, Mr TG emphasised the importance of Ms RL providing financial information to support her claim. He advised Ms RL that if she was to succeed in persuading the court that she should be awarded compensation, then she needed to be able to show a clear connection between an actual amount of loss of income and directly link that loss with [Co 2]'s failure to provide her with necessary systems, appropriate marketing, and a capacity for her to [123's] listed with other [AB] agencies.

[177] I am satisfied that Ms RL was confident that she would be able to produce evidence to the court that would conclusively establish that [Co 2] had not truthfully represented the agreement that had been negotiated.

[178] However, an examination of correspondence between the lawyers and Ms RL over a period of several months, gives indication that the lawyers had considerable difficulty in getting Ms RL to provide them with information they needed to advance her case (particularly financial information) and that Ms RL's reluctance to provide this information, and on occasions her disinclination to engage with her lawyers, was a significant factor in delaying the completion of discovery and frustrated the lawyers' attempts to finalise the briefs of evidence.

[179] Ms RL had been advised on 31 March 2016,[11] that discovery had to be completed by 13 May 2016. The process of discovery had been carefully explained to her, and she had been cautioned that it was "critical" that she be aware of her discovery obligations. Mr TG reiterated earlier advice, that Ms RL would need to disclose all her financial records, to substantiate the extent of her claimed loss.

[180] Difficulties with finalising arrangements for settlement of overdue accounts were a continuing problem throughout the retainer but that was not the only obstacle the lawyers were managing. On 28 June 2016, Mr BN wrote to Ms RL to advise that it was not simply the problem with payment of fees that was causing difficulties with the retainer, but her failure to provide instructions. Mr BN noted that Mr TG had been unable to make contact with her, and that her "failure to provide instructions in a timely manner has been a feature of this retainer".

[181] Following a meeting with his fellow directors, Mr BN clarified for Ms RL the basis upon which the firm would continue to agree to represent her. He refers again to the difficulties in obtaining "timely" instructions, and (referencing the preparation of briefs) advises that "we need to be ahead of this all the way through to make sure that you are as well represented as possible". Mr BN informs Ms RL that his firm's willingness to

[11] Mr TG, correspondence to Ms RL (31 March 2016).

continue to represent her, was dependent not only on her settling fees, but also on her "providing timely instructions".

[182] The lawyers continued to have difficulty in persuading Ms RL to meet her discovery obligations. On 31 August 2016, Mr TG advised Ms RL that he had received a phone call from opposing counsel, informing him that counsel did not consider that Ms RL had complied with her discovery obligations. Request was made of Ms RL to provide documents that had been requested.

[183] On 1 September 2016, Mr VK wrote to Ms RL. Mr VK advised that he felt compelled to "weigh in" on the discovery issue. Mr VK reinforced the need for Ms RL to cooperate in providing full discovery. He noted Ms RL's reluctance to provide information concerning her earnings, and noted that:

> We have been engaged in extensive correspondence with you regarding this, and we still do not have complete information or an understanding of exactly why you do not want this information disclosed to the court. It is making it very difficult for us to progress your case efficiently and focus on other upcoming milestones such as drafting your briefs of evidence. The constant back-and-forth and the drip feeding of documents and resistance to providing information (even to us) is increasing the costs you are incurring with us for what should be a routine part of the court process.

[184] Mr VK also expressed concern that Ms RL had failed to meet with, and provide information to, the accounting expert whom the lawyers had engaged to provide evidence to the court. Mr VK advised that the accountant had been making request of Ms RL to meet with him for some time. He noted, that the lawyers had been "recommending repeatedly since early June 2016 that you meet with Mr WH to discuss your case".

[185] On 8 September 2016, opposing counsel wrote to Mr TG to inform him, that Ms RL's failure to comply with discovery obligations would be raised at trial.

[186] On 8 September 2016, the firm's practice manager wrote to Ms RL to advise that the lawyers were still to receive documents requested or to be provided with instructions on discovery as requested.

[187] On 21 October 2016, Mr BN, following up further with Ms RL on matters relating to outstanding fees, advised Ms RL that discovery had been completed, and briefs of evidence were being finalised.

[188] A discovery process which had been directed to be completed by 13 May 2016 was not finalised until late October 2016.

[189] Finalising briefs of evidence, a task which the lawyers had anticipated would be completed by 30 June 2016, was not able to be finalised until approximately a month out from commencement of the trial.

[190] It is reasonable for the lawyers to argue, as they did, that they were not in a position to provide a full evaluation of the merits of Ms RL's claim going forward, until they were in receipt of the information which enabled them to fully stress test the account of events that Ms RL had consistently maintained throughout, that she would be able to establish in court.

[191] It was at this late stage, that the lawyers:

(a) became aware that witnesses Ms RL indicated would give evidence on her behalf were not prepared to do so; and

(b) became aware that witnesses who Ms RL had advised would provide a particular view of events which accorded with hers, were not prepared to corroborate Ms RL's account of events; and

(c) were alerted to information in the briefs filed by the opposition that was particularly damaging to Ms RL's case.

[192] I think it inevitable that if Ms RL had been more cooperative in assisting her lawyers complete discovery, and more cooperative in providing her lawyers with financial information which the lawyers had identified to her at the commencement of the retainer was critical to establishing her claim, that significant problems that Ms RL faced with her case would have been identified earlier, and an opportunity provided for Ms RL, at a much earlier stage than it was, for her to make a decision as to whether it was in her best interest to continue with the litigation.

[193] It was regrettable that Ms RL was not more conscientious in providing information to her lawyers that would have allowed them to complete a more comprehensive assessment of the merits in her case, but I do not consider that the lawyers can be fairly criticised for the not inconsiderable delay that had occurred in completing discovery, and finalising preparation for the exchange of briefs.

[194] In March 2016 she had been cautioned that it was imperative that she provide disclosure of relevant financial information in order to provide foundation for her compensation claim.

[195] As noted, in June 2016, Mr BN was cautioning Ms RL that the failure to provide instructions had been a feature of the retainer.

[196] Despite this advice, and repeated requests of her to provide information, Ms RL was reluctant to meet with the accountant who had been engaged to provide critical expert accounting evidence to the court. And that reluctance did not result in modest delay in the advancing of the proceedings. As noted, in September 2016, the lawyers were expressing frustration that they had been repeatedly recommending that Ms RL become engaged in the process of assembling the expert evidence, since early June 2016.

[197] I do not consider that the lawyers breached a duty to provide competent advice to Ms RL, by failing to adequately monitor the progression of her case.

[198] I consider that when Mr TG wrote to Ms RL on 1 November 2016 to inform her that he considered that she would be best advised to settle [Co 2]'s claim, that this was the earliest opportunity he had to provide her with firm recommendation that she proceed no further.

[199] Despite being informed that her case was fragile, Ms RL retained a confidence in her case.

[200] That confidence was based on a firm conviction that [Co 2] had misrepresented events at the start, and that this deceptiveness would be exposed when their evidence was subject to the scrutiny it would receive at trial.

[201] Ms RL's preparedness to press on was, in my view, prompted in part by her confidence that she would, if the matter proceeded to trial, be able to establish flaws in [Co 2]'s argument.

[202] I have concluded that the lawyers' decision to inform Ms RL at relatively late notice that her case had little prospect of success raised no professional conduct issues. However, if I am wrong on that, I am nevertheless satisfied that argument as to whether the lawyers' advice was inadequate to the extent alleged by Ms RL, in essence raises issues of negligence that cannot be properly addressed in the disciplinary jurisdiction.

[203] Ms RL was alerted to the possibility that her complaint may raise an allegation of negligence, when she, in articulating her complaint at commencement, raised issue as to whether she had been negligently advised.

[204] Negligence is a cause of action that is well-understood by traditional civil courts. Its ingredients include a duty of care, a breach of that duty, and a measurable loss that has been caused by the breach of duty. Findings of negligence may only be arrived at after comprehensive – sometimes expert – evidence has been given. Issues that often

arise in claims of negligence include whether a person has breached their duty of care, or whether there is a connection between the alleged loss and the breach of duty. Complex arguments often arise about whether any loss has been suffered.

[205] Neither a Standards Committee nor the LCRO is equipped to make findings of negligence. The default position for a Standards Committee is to conduct their hearings on the papers. A negligence analysis is simply not possible with that process.

Did [JPBN] terminate the retainer without good cause?

[206] The Standards Committee, in summarising the key elements of Ms RL's complaints, identified one of the issues to be addressed, as a consideration of the question as to whether Ms RL was improperly pressured into signing a settlement agreement, by [JPBN]'s decision to withdraw from acting immediately before the commencement of the trial.

[207] Ms RL had argued that the Committee's investigation of her complaints should include inquiry into the issue as to whether the lawyers had, in what she described as abandoning her complaint, contributed to her financial loss.

[208] Whilst framed in different ways, both the Committee and Ms RL's articulation of this aspect of the complaints, engages a consideration of the question as to whether the lawyers had grounds to terminate the retainer.

[209] Rule 4.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), reinforces the obligation on lawyers, once retained, to complete the retainer, and explains the circumstances in which a lawyer may terminate.

[210] Rule 4.2 relevantly provides:

> **Duty to complete retainer**
>
> 4.2 A lawyer who has been retained by a client must complete the regulated services required by the client under the retainer unless—
>
> (a) the lawyer is discharged from the engagement by the client;
>
> (b) the lawyer and the client have agreed that the lawyer is no longer to act for the client; or
>
> (c) the lawyer terminates the retainer for good cause and after giving reasonable notice to the client specifying grounds for termination.
>
> 4.2.1 Good cause includes—
>
> …

> (b) the inability or failure of the client to pay a fee on the agreed basis or, in the absence of an agreed basis, a reasonable fee at the appropriate time:
>
> …
>
> 4.2.3 A lawyer must not terminate a retainer or withdraw from proceedings on the ground that the client has failed to make arrangements satisfactory to the lawyer for payment of the lawyer's costs, unless the lawyer has—
>
> (a) had due regard to his or her fiduciary duties to the client concerned; and
>
> (b) given the client reasonable notice to enable the client to make alternative arrangements for representation.
>
> 4.2.4 A lawyer who terminates a retainer must give reasonable assistance to the client to find another lawyer.

[211] A lawyer may terminate their retainer with a client if fees are not paid. This includes interim invoices sent during a retainer that remain unpaid, as well as fees requested in advance.

[212] However, before a lawyer terminates a retainer on the basis that their fees cannot be met, they must have "due regard to [their] fiduciary duties to [their] client" and give their client "reasonable notice to enable [that] client to make alternative arrangements for representation".

[213] Once a retainer is terminated a lawyer must provide "reasonable assistance to [their] client to find another lawyer".

[214] In *Ethics, Professional Responsibility and the Lawyer*, the learned authors noted that:[12]

> When the lawyer has a discretion to terminate the retainer, he or she must take into account the prejudice that will flow from the termination. Indeed, whenever a lawyer terminates a retainer, the lawyer must act to minimise the prejudice to the client. … More explicit provision exists in respect of a lawyer who has terminated (or seeks to terminate) for non-payment of fees. In that case, the lawyer must show that he or she [has complied with the requirements of rule 4.2.3(a) and (b)].
>
> If the client would be unable to obtain legal assistance before a hearing or other important event (such as a scheduled meeting) where assistance was required, the lawyer should refrain from terminating the relationship. The prejudice may be minimised when the lawyer assists the client by contacting and meeting with another lawyer and handing over and explaining documentation …
>
> …

[12] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.8.3].

> It goes without saying that it would be wholly inappropriate for a lawyer to threaten the termination of a retainer preceding some important trial date (or other date such as an arbitration or mediation) simply to ensure fees are paid.

[215] Ms RL's difficulties in paying her accounts had been a persistent problem throughout the course of the retainer.

[216] She had been cautioned as early as March 2016 that the firm would be unable to continue working for her if she failed to get her accounts in order.

[217] A pattern developed over a period of months leading up to trial of Ms RL being warned that it was imperative that she clear her arrears, Ms RL taking steps to do what she could, but her not being able to get on top of the situation. The problem became acute on the eve of the trial when Ms RL was confronted with requirement to both clear her arrears and pay a significant sum on account as security for anticipated costs of trial.

[218] On 16 November 2016, Mr BN wrote to Ms RL seeking clarification from her as to how she proposed to settle her accounts. He noted that Ms RL had failed to respond to previous emails he had forwarded to her, and records that Ms RL had, in a meeting with Mr VK and Mr TG the previous week, undertaken to "come back to us on a number of matters, including fees", noting "[t]his matter is now urgent".

[219] When responding to Mr BN, Ms RL expressed concern that she was unaware of the extent to which costs had escalated, but nevertheless confirmed that she would be able to make a part payment to arrears. She considered her claim was "worth fighting for".

[220] On 17 November 2016, Mr BN wrote to Ms RL, expressing concern that she had failed to provide assurances sought that she would confirm arrangements to ensure payment of the fees.

[221] It was at this point that repeated indications of possibility that the retainer would be terminated took a more serious turn. Ms RL was advised that if she was unable to provide a plan, endorsed by her accountant, as to how she was to settle arrears and meet ongoing costs of litigation, the lawyers would not be prepared to take any further steps on her behalf.

[222] Mr BN required Ms RL to provide confirmation from her bank that loan arrangements had been put in place, sufficient to allow "in excess of $100,000 to be released, first to us in payment of outstanding amounts, and the remainder to be paid into YJ's trust account."

[223] Ms RL responded to Mr BN expressing disappointment about the approach being adopted, but nevertheless expressing expectation that "you continue your service to me until my case is finalised".

[224] Ms RL advised that she was not in a position to settle all arrears but would be able to do so over a period of time.

[225] On 23 November 2016, Ms RL forwarded to Mr BN a preapproval from her bank. The documents confirmed a loan offer to Ms RL in the sum of $700,000.

[226] As has been noted, Mr BN promptly responded to Ms RL with indication that the arrangements made by Ms RL were "too little too late". He expressed concern that there were a number of conditions attached to the loan agreement that he considered would take weeks to satisfy. He concluded that there was no guarantee that the loan would receive final approval. He was concerned that a condition of the offer required Ms RL to repay specified existing debts. He noted that his firm had no knowledge as to the extent of those debts. Mr BN did not consider that the loan offer provided sufficient assurances of payment to enable the lawyers to continue. He considered that if Ms RL had taken steps to sort out arrangements to deal with the issues earlier, the situation would not have deteriorated to the point it had.

[227] Mr BN confirmed that the lawyers would not take any further steps in respect to the upcoming hearing.

[228] Argument could be advanced that the lawyers did not in fact terminate the retainer, as they continued to represent Ms RL. However, I do not consider that the lawyers' preparedness to assist with finalising settlement can be sensibly construed as the initial retainer continuing. On November 23, Mr BN terminated the retainer his firm had with Ms RL to act for her in the trial. The fact that after that date a separate retainer was agreed whereby advice would be given in relation to settlement, does not affect the fact that the trial retainer had been terminated.

[229] The question is whether Ms RL, after being informed by her lawyers on November 23 that they were unwilling to take her case to trial, had a realistic opportunity of being in a position to engage fresh counsel. The lawyers had had the carriage of the matter for over 12 months. It was a five-day trial, involving claim and counterclaim and a significant amount of contested evidence.

[230] The trial was to commence on 1 December 2016. It would have been difficult for newly instructed counsel to adequately prepare for the case at last minute. Counsel would have required Ms RL's files and security for payment of fees.

[231] None of the lawyers' conduct in relation to fees up until 21 October 2016 can be criticised.

[232] By 21 October, things had not materially progressed in relation to fees: there were substantial sums outstanding and the lawyers clearly needed comfort in relation to future fees including for the five-day trial that was to commence in 6 weeks.

[233] On 21 October, Ms RL was advised that her arrears to date were $40,852.94, that she had work in progress of $13,000, that estimated costs for preparing for hearing were $20,000 plus GST and disbursements, and that the costs for the hearing would be in the vicinity of $35,000 plus GST and disbursements.

[234] On 31 October 2016, on the day that Ms RL was given estimate of the substantial costs that would be involved in progressing her case to conclusion, Ms RL was rendered an account in the sum of $20,977.27 (inclusive of GST and office expenses).

[235] On 4 November 2016, she was informed that there was a high probability that [Co 2] would be successful with their claim, and that her counterclaim would fail.

[236] Despite prediction that her claim would fail, Ms RL, whilst uncertain and troubled as to what she should do next, decided that she had made such significant financial investment in the proceedings, that she had no option but to continue. She would take the risk.

[237] The lawyers continued to prepare for the trial.

[238] The extent of that preparation is reflected in the invoice rendered to Ms RL on 6 December 2016.

[239] That invoice covered work from 1 November 2016 to 2 December 2016. Some of the work encompassed by the invoice related to time spent on finalising settlement following the decision to withdraw from the trial,[13] but a significant portion of the work involved preparation for the hearing.

[240] The invoice of 6 December 2016 included:

(a) drafting of reply briefs; and

(b) drafting agreed statement of facts; and

[13] By reference to the time records, I conclude that costs of approximately $6,400 were incurred on matters relating to settlement.

(c) drafting opening and closing submissions; and

(d) drafting legal submissions.

[241] Ms RL had incurred legal costs in October 2016 (inclusive of GST and disbursements) of $20,997.27, and costs to 6 December (inclusive of GST and disbursements) of $23,331.78, a total of $44,329.05.

[242] On the afternoon of Wednesday 23 November 2016, six working days before the trial was to commence, Ms RL was advised that her lawyers were not prepared to take the matter to trial.

[243] That advice was received in circumstances where she had, in the three-week period prior to receiving that advice, incurred legal costs of approximately $13,500.

[244] Rule 4.2.3 prevents a lawyer from terminating a retainer or withdrawing from a case on grounds of unpaid fees, unless the lawyer has had due regard to their fiduciary duties to their client, given the client reasonable notice to enable alternative representation and has given reasonable assistance to that end.

[245] A fiduciary duty is a duty to act in good faith for the benefit of another. It is a duty founded on a relationship of trust. It is a "fundamental obligation" which every lawyer who provides regulated services must comply with in terms of s 4 (c) of the Act. A fiduciary relationship arises in circumstances in which one person has undertaken to act in the interests of another, or where a person has communicated an expectation that another will act to protect or promote his or her interests. The duty arises in situations of reliance or trust between parties. It also arises with regard to the keeping of confidences. Where a person seeks professional assistance, there is an imbalance of knowledge between the parties, with the client relying on the expertise of the professional person and doing so with the expectation that the expertise will be applied to promote and safeguard the interests of the client.[14]

[246] The question as to whether the lawyers had a fiduciary duty to their client, whatever their views about the merits of her case, to allow her the opportunity to defend the claim and present her counterclaim was not, in my view, adequately addressed by the Committee, partly as a consequence of the Committee focusing its inquiry in its final stages primarily on the issue as to whether fees charged were fair and reasonable. The Committee should, in my view, have given this issue greater attention.

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[14] Scragg, *The Ethical Lawyer, Legal or Ethics and Professional Responsibility*, (2018) at p [99-100]

[247] It is not disputed that lawyers are entitled to be paid for their work, nor suggested that lawyers are compelled because of their fiduciary obligations to their client, to continue working on a client's file in circumstances where the client is unable to pay.

[248] It is not possible to impose a bright-line time after which termination of a retainer for non-payment of fees will fall foul of r 4.2.3. It will always depend upon the circumstances of the particular case involved.

[249] But the lawyers had a duty and obligation to ensure that if they were to terminate the retainer, that Ms RL had sufficient time to engage fresh counsel.

[250] The lawyers understandably and reasonably were concerned to protect their interests but that was not and could not be their sole focus, bearing in mind the fiduciary obligations owed to Ms RL.

[251] If termination of the retainer was being contemplated, the lawyers had an obligation to ensure that Ms RL had realistic opportunity to engage fresh counsel.

[252] That is the focus of r 4.2.3 which directs that before a lawyer takes steps to terminate a retainer on grounds that a client has failed to make arrangements satisfactory to the lawyer for payment of the lawyers' fees, the lawyer must have due regard to the fiduciary duties owed to the client, and ensure that the client has reasonable notice to enable the client to make alternative arrangements for representation.

[253] Balancing the need to ensure that their financial interests are protected with the obligations owed to their client, can be challenging for a lawyer.

[254] The lawyers would argue that their continued willingness to extend latitude to Ms RL with her fees, reflected a fair and reasonable approach which was focused on endeavouring to ensure that Ms RL was in a position to advance her case.

[255] There is merit in that argument, but at the same time, it was the lawyers' responsibility to ensure that if a decision was made to terminate, that the decision was made in sufficient time to ensure that Ms RL was not denied opportunity to advance her case.

[256] This was not a situation where the lawyers were unaware of the problems that Ms RL was having in paying her accounts.

[257] I have given careful attention to the issues raised by the termination of the retainer, and in doing so, have not overlooked a proper consideration of the attempts made by the lawyers to allow opportunity to Ms RL to put her house in order.

[258] But in circumstances where lawyers have been instructed for a considerable period of time, where the fees billed have been not insubstantial, where the trial pending is scheduled to take some days, and thousands of dollars have been billed in costs of preparing for trial in the weeks preceding commencement of the trial, a decision to terminate at relatively last minute is not a decision to be lightly made.

[259] Question can reasonably be asked of the lawyers as to why, when advice was given to Ms RL on 4 November that her case faced what was presented as seemingly insurmountable obstacles, that difficult advice to Ms RL was not accompanied by indication that the lawyers would not proceed further with preparations for trial until such time as issues with fees were resolved.

[260] I accept that Ms RL was being asked to provide indication as to whether she was in agreement with submitting a Calderbank offer, and that further attempts were continuing to resolve the problems with fees, but a degree of uncertainty with the direction the retainer was taking was amply illustrated by the email communications forwarded to Ms RL on 16 November 2016. Mr TG wrote to Ms RL on that day to advise that preparations for hearing were proceeding at full steam. Mr BN wrote on that same day to express concern that Ms RL had not responded to request to clarify how she proposed to settle her accounts.

[261] The lawyers would argue that until such time as they received either instructions from Ms RL to settle, or steps were taken to terminate the retainer, they were obliged to continue preparations for hearing.

[262] But in circumstances where the lawyers had been repeatedly expressing possibility of terminating the retainer, and Ms RL had expressed concern that anticipated fees considerably exceeded what she understood had been a realistic estimate of costs provided at the commencement of the retainer, it was important that the lawyers make careful assessment of the risks involved in allowing the retainer to continue.

[263] I do not consider that the Standards Committee gave sufficient attention to the question as to whether the retainer had been properly terminated.

[264] With every respect to the Committee, its decision to deal with what was a critical element of Ms RL's complaint by reference to this element of complaint as a "residual" issue, and its conclusion reached that the lawyers' repeated indication that non-payment of invoices could result in termination of the retainer was sufficient to satisfy it that no issues were raised by Mr BN's termination of the retainer, did not adequately address the issue as to whether the lawyers had proper regard to their fiduciary duties, or gave

sufficient attention to the question as to whether their client was given adequate opportunity to make alternative arrangements for representation.

[265] I consider it appropriate to return this issue to the Committee for reconsideration.

[266] That will also allow opportunity for the lawyers to have proper opportunity to respond to complaint that they terminated the retainer without sufficient attention to their obligations to complete the retainer (r 4.2, 4.22, 4.23).

[267] Whilst I am satisfied that Ms RL specifically identified concerns about the manner of termination as a discrete element of complaint, and the Committee indirectly addressed the issue in its decision (specifically referencing r 4.2.1 of the Rules in concluding that no issues were raised by the termination of the retainer), the lawyers were not directly asked to address the issue in the notice of hearing issued by the Standards Committee.

Were the fees charged fair and reasonable?

[268] As noted, the Committee focused its inquiry on the issue as to whether fees charged were fair and reasonable.

[269] I consider the Committee carried out a careful and comprehensive analysis of Ms RL's complaint that fees charged were unreasonable.

[270] I note that the Committee's decision confirms that the membership of the Committee included four members with relevant expertise in litigation, and two members with expertise in civil litigation.

[271] I have examined the material considered by the Committee, and having done so, arrive at similar conclusion that the fees charged were fair and reasonable.

[272] In conducting that examination, I have considered:

(a) the invoices rendered; and

(b) the time records; and

(c) the work undertaken; and

(d) the complexity of the issues, and

(e) the extent to which the case engaged a number of witness; and

(f) specific complaint that fees charged for completing discovery were excessive

[273] I have completed that examination by reference to the relevant fee factors.

[274] I also agree with the Committee, that the initial estimate provided was precisely that, an estimate which provided a minimum estimate of costs if the matter proceeded to trial.

[275] In providing the initial estimate, Mr TG made it clear that it was difficult, in litigation such as this, to provide an accurate account of what final costs may be.

[276] As has been noted throughout this decision, Ms RL's complaint about her fees is complaint that after expending a considerable sum she was left with no opportunity to advance her case and left with no option but to engage in settlement negotiations in circumstances where her position had been so weakened that she had nothing to bring to the negotiating table.

[277] Whilst I conclude that the fees charged were fair and reasonable, if the Committee when reconsidering the question as to whether the retainer had been terminated with good cause, reached conclusion that the retainer should not have been terminated at the point that it was, a potential remedy for that breach, if established, may engage a consideration as to whether some of the costs incurred in the final push to trial, were fairly charged.

[278] That approach would present as providing more realistic opportunity of providing remedy for a breach of the Rules (if established) than suggestion by Ms RL that she be compensated for loss resulting from the lawyers, as she described it, abandoning her. That argument proceeds on the entirely speculative assumption that Ms RL would have enjoyed a degree of success if the matter had proceeded to trial.

Anonymised publication

[279] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

Pursuant to s 209(1)(a) of the Lawyers and Conveyancers Act 2006:

(a) The Standards Committee is directed to reconsider and determine the complaint that the lawyers terminated the retainer without good cause.

(b) In all other respects, the decision of the Standards Committee is confirmed (s 211(a) of the Act).

DATED this 1ST day of April 2021

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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:

Ms RL as the Applicant
Messrs BN, TG and VK as the Respondents
Ms CW as the Representative for the Applicant
[Area] Standards Committee [X]
New Zealand Law Society