LCRO 162/2015
66/2016

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Auckland Standards Committee 3
BETWEEN	**IA** Applicant
AND	**CMR (Deceased)** Respondent

DECISION

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

Introduction

[1] Mr IA has applied for reviews of two decisions by the [City] Standards Committee [X] arising from a complaint concerning his conduct and fees. The Committee concluded there had been unsatisfactory conduct on Mr IA's part, and then ordered publication of his name in the context of the first decision.

Procedural history

[2] This review traverses issues that have been considered by this Office previously and referred back to the Committee for determination.[1]

Background

[1] LCRO 234/2010.

[3] Between June and November 2009 Mr IA and others at the firm [PA] (the firm) acted for HSR (H) and companies of which he was a director (the companies).[2]

[4] Mr and Mrs CMR transferred their interest in the family business to their sons, (H) and (B) in the 1980s.

[5] Although he remained named as sole director of the companies, (H) allowed others he trusted to become increasingly involved in the day-to-day operation of the companies' business. By 2007 (H) had delegated to such an extent he did not have a firm grasp on some fairly important aspects of the companies' business. At some point (H) became aware that companies of which he was sole director were facing some fairly serious problems. With financial support from his parents, he appointed Mr TG as liquidator.

[6] In the course of the liquidator's inquiries, (H) faced questions arising from his obligations as the director. Allegations of possible breaches of director's duties and serious fraud were made. The Inland Revenue Department (IRD) and other creditors wanted money.

[7] (H) instructed a lawyer, Mr LE, who ceased acting in May 2009. At about that time (H) asked Mr IA to step in. Mr IA is said to have been a long standing friend, and to have previously acted for (H), the companies, and Mr and Mrs CMR.

[8] In May 2009 Mr IA agreed to provide (H) with legal services. Mr IA says his instructions from (H) related to gaining an understanding of how he and the companies had got into the situation they were in, understanding what (H)'s civil and criminal liabilities might be, avoiding (H)'s bankruptcy, protecting (H)'s reputation and preserving commercial relationships so that he could carry on in business.[3]

[9] (H)'s predicament was far from straightforward.

[10] Mr IA says he immediately explained to (H) that the liquidator's statutory duties and powers included reporting offences, and that (H) had various obligations as a director which included providing the liquidator with information. He referred to the prospect of imminent Serious Fraud Office (SFO) involvement and other urgent issues. Mr IA says he could see that the shareholder's account recorded on the companies' financial statements said (H) held over $1 million in assets, so at that stage he was satisfied (H) could pay him.

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[2] CMR (1996) Limited (In Liquidation); [Business 1] Limited (In Liquidation); [Business 2] Limited (In Liquidation).
[3] Letter IA to Lawyers Complaints Service (13 April 2010) at [1.7].

[11] Mr IA provided legal services to (H) during May 2010, and issued invoices to (H) charging fees of about $35,000 for those services.

[12] Under a covering letter dated 4 June 2009 Mr IA sent an invoice dated 31 May to (H). The covering letter refers to the "complexity and the multiplicity of the transactions under investigation" and says it would be some time before Mr IA was in a position to fully advise (H). However, Mr IA said he would reduce his charge out rate from the $450 an hour he would ordinarily have charged for attendances of that nature, to $350 an hour.

[13] Mr IA also enclosed a letter of engagement he had prepared dated 3 June 2009 addressed to (H). The letter of engagement referred to the companies, and summarised the legal services to be provided simply as "legal services arising from the liquidation of" the companies. It set out the bases on which fees would be calculated and said that Mr IA and his partner Mr SL would be responsible for the provision of services.

[14] It then became apparent that (H)'s personal financial predicament could come to present a significant practical problem, in that Mr IA would want to be remunerated for his efforts, but would also become one among many unsecured creditors without any special priority. Mr IA says it became apparent to him early on that (H)'s personal liabilities could be substantial. He and (H) discussed the situation and agreed the problem could be resolved by Mr and Mrs CMR paying Mr IA's fees.

[15] Mr IA's reasons for wanting Mr and Mrs CMR to underwrite (H)'s fees were explained as follows:[4]

> Creditors needed to be assured that any settlement sum would not be claimed back if at a later date (H) was to be bankrupted. Hence the decision to provide terms of engagement to the complainants and treat monies paid as being paid by them and not by (H). This was to allow [Mr IA] to negotiate with (H)'s creditors' on the basis of any settlement they came to, could not be claimed back.

[16] Mr IA says the principal argument he was intending to advance was that (H) "had no assets other than his shares and current account as a consequence of the fraud perpetrated against him". Thus if there was no value in the companies, (H) effectively had nothing. Mr IA says he understood how important it was that he did not misrepresent (H)'s financial position to anyone at any point.

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[4] Submissions IA to LCRO (24 February 2017).

[17] Mr IA says that third parties often pay insolvency practitioners' fees in similar circumstances.

[18] Mr IA arranged for a second letter of engagement to be prepared, addressed to Mr and Mrs CMR, attaching standard terms of engagement and information for clients. In addition to the companies, that letter of engagement also referred to legal services that Mr IA and the firm would provide to (H) arising from the liquidation of the companies listed below, "as such liquidations effect [sic] your son, HSR (H)".

[19] (H) collected the letter of engagement from Mr IA at his offices, saying he had explained the circumstances to his parents and they understood and accepted the position.[5] Mr IA says he suggested he should meet with Mr and Mrs CMR to explain the situation to them, but that he acquiesced to (H)'s view that that was unnecessary.

[20] A copy of the second letter of engagement was then returned to Mr IA's offices, apparently having been signed by Mr and Mrs CMR on 22 June 2009.

[21] Mr IA'S conduct in that respect was subsequently characterised as (H) having been coerced into taking the letter of engagement to Mr and Mrs CMR for them to sign and return.[6] Mr IA's conduct is described as an abuse of the trust and confidence reposed in him by (H) and Mr and Mrs CMR.[7]

[22] Mr IA provided further legal services to (H) and the companies aimed at limiting or avoiding personal, business, civil and criminal liabilities. Mr IA says that over the course of several weeks he received 11 storage boxes of files, documents and correspondence, and that when he first received instructions he had no idea as to the nature, scope and extent of attendances that would be required of him. He adds that the nature, extent and scope of the required attendances expanded significantly as the retainer progressed.

[23] Mr IA attributes the escalation of the retainer to the fact that (H) had little understanding of his companies' financial affairs, having effectively ceded management to a business partner in 2006 who is alleged to have perpetrated a series of frauds against the companies and (H).

[24] Mr IA opened 22 separate files on the basis of the instructions he received from (H) including one for general attendances, and others relating to disputes over leases of retail premises, contracts and various debts. He describes "an extensive

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[5] Affidavit of EW (16 November 2010).
[6] Submission CMR to LCRO (26 January 2012) at 2.
[7] At 8.

investigation into the affairs of the companies, resulting in numerous attendances upon (H), the liquidator and his support staff, and resulting in numerous detailed reports to the liquidator".[8]

[25] Mr IA says it was apparent to him that the liquidator's objective was to determine whether (H) had been involved in stripping assets out of the business, or whether that had been achieved without (H)'s involvement. It appears the liquidator was satisfied (H) was not involved on the basis of statutory declarations prepared by Mr IA, on (H)'s instructions, as to the companies' affairs and the background to the liquidations. Mr IA says the liquidator passed those documents on to other regulatory bodies, including the SFO, and adopted them as the basis for claims against (H)'s former business associates in attempting to recover the company assets.

[26] Mr IA says virtually all of his interactions were with (H), from whom he received instructions, and to whom he provided correspondence, reports and communications. Mr IA says he relied on (H)'s advice that his parents had approved the instructions he was giving, and the work that Mr IA was undertaking. Mr IA says he defended an application for summary judgment before the High Court on the basis that he was acting on instructions from (H)'s family, and specifically informed all parties with whom he dealt that the firm was acting on instructions from (H)'s family.

[27] Mr IA refers to his dealings with some of (H)'s creditors over alleged debts in excess of $700,000, and the settlements and compromises he negotiated in relation to those. Mr IA also refers to a notice (H) received from IRD claiming "outstanding employer deductions totalling $625,036.01".[9] Mr IA says that the investigations he carried out on (H)'s instructions revealed (H) had a possible defence to a potential IRD prosecution, although the IRD's investigations into the company affairs continued.

[28] Mr IA refers to information his team unearthed evidencing alleged misdeeds by (H)'s business associates, further instructions from (H), and investigations into those matters which were still underway when Mr IA's retainer ended. The liquidator mentioned money laundering. Mr IA refers to company claims and losses totalling over $12 million.

[29] Mr IA issued invoices for his fees to Mr and Mrs CMR which ultimately totalled $303,394.41.

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[8] Above n 5, at 3.4.
[9] At 6.1.

[30] Mr and Mrs CMR paid instalments totalling $55,000. Mr IA applied the first payment to settle one of the creditor's claims and the first two invoices he had rendered to (H) in May 2009. The balance was applied to invoices addressed to Mr and Mrs CMR.

[31] Mr IA continued to do work on (H)'s instructions until 3 November 2009, and sent his last invoice to Mr and Mrs CMR under cover of a letter dated 1 December 2009.

[32] With his fees not paid, and his retainer at an end, Mr IA claimed a solicitor's lien over materials in his files.

[33] B stepped in on behalf of his parents and (H), and laid a complaint about Mr IA to the New Zealand Law Society Lawyers Complaints Service (Complaints Service) in early 2010.

Complaint

[34] The complaint proceeded on the basis that Mr IA had taken advantage of Mr and Mrs CMR and (H), by:

(a) soliciting work from (H) when (H) was in an emotionally vulnerable state;

(b) providing poor advice on strategy then not following through on his own advice;

(c) padding his costs and overcharging Mr and Mrs CMR.

First complaint process

[35] In the course of the complaint process, the parties attended mediation and reached agreement whereby Mr IA agreed to cancel his unpaid invoices, and to release the lien over the files and deliver them up by 21 July 2010. For their part, CMR's family ((H), (B), Mr and Mrs CMR) agreed to settle fully and finally all existing and future claims, complaints, issues or matters of any nature whatsoever between them, Mr IA and the firm. Mr IA confirmed at the review hearing he had cancelled his unpaid invoices, released the files, and that the settlement agreement had not been set aside.

[36] The Committee then commenced an inquiry of its own motion pursuant to s 130(c) of the Lawyers and Conveyancers Act 2006 (the Act) to consider Mr IA's conduct, but not the fee complaints. The fee complaint was determined by the issue of

a certificate pursuant to s 161(2) to the effect that Mr IA's fee had been reduced to the amount agreed at mediation and was already paid in full. Mr IA responded to the issues the Committee had laid out without his relevant files and documents.

[37] The Committee considered the various materials and determined the own motion inquiry on the basis that there had been unsatisfactory conduct on the part of Mr IA in that he had contravened rule 11.2 of the Lawyers Conduct and Client Care Rules[10] (the rules) by failing to ensure Mr and Mrs CMR received independent advice before accepting liability for (H)'s legal fees. The Committee imposed a fine of $1,500, an order for costs of $2,000 and directed publication of the facts without identifying the parties.

First LCRO review

[38] Both parties applied to this Office for reviews of the first decision.[11]

[39] Mr CMR contended that the unsatisfactory conduct determination should remain in place. He said the decision contained errors of fact, because Mr IA's evidence was not to be trusted and there were failures in the Committee's consideration of the complaint as a whole, given the wide ranging allegations and the orders sought.

[40] Mr IA's objections included the Committee having relied on a number of materially wrong findings of fact. He wanted the unsatisfactory conduct finding reversed. He also expressed the view that Mr CMR should not be permitted to participate in the process, given the terms of the agreement reached in mediation.

[41] The LCRO resolved the question of Mr CMR's standing to apply for a review with reference to s 195(2), given the investigation by the Committee was commenced pursuant to s 130(c). The LCRO said:

> [21] The practitioner's point is that the ongoing investigation was an own-motion investigation by the Standards Committee, and having withdrawn their complaints the Complainants had no standing to seek a review.
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> [22] This is resolved by the right of review created by section 195(2) of the Act which, in relation to a Committee's own-motion enquires [sic], confers such a right on "the person to whom the enquiry relates". Such a person is plainly different from the lawyer under scrutiny who is described in the previous section as "the person in respect of whom the complaint is made", and can only be a reference to the Complainant.

[10] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[11] LCRO 234/2010 and 241/2010.

[42] The LCRO concluded that s 195(2) established the right for Mr CMR to seek a review.

[43] The LCRO considered there had been a lack of clarity regarding the scope of the Committee's inquiry that had resulted in miscommunication with the practitioner. The LCRO also questioned the Committee's decision to make no further inquiry into the complaints about fees, even though Mr IA had cancelled part of his fees. Based in part on an apparent discrepancy in the agreement documenting the outcome of the mediation, and the view that the practitioner's charges and charging practices warranted further inquiry, the LCRO formed the view that the Committee should have considered whether the fee complaint raised disciplinary issues.

[44] The LCRO overturned the unsatisfactory conduct finding and referred the whole complaint back to the Committee with a suggestion that the Committee might be assisted by an investigator, and directions to commence a fresh investigation, appoint a costs assessor and inquire into a connected allegation that Mr IA left the CMR's documents in a public area after the mediation.

Reconsideration by Committee

[45] The Committee received various documents from the parties, including Ms AG, a family member of the CMRs, who said that Mr and Mrs CMR paid a total of $185,000 in legal fees and disbursements in a little over three months, until on 24 August 2009 they told Mr IA that "with nothing meaningful to show for it they would no longer be paying him any further money".[12]

[46] It appears (B) and Mr IA met on 4 September 2009. Mr IA suggested (B) could advance funds to Mr and Mrs CMR so that they could pay Mr IA's fees.

[47] A copy of an email Mr IA sent to B dated 6 October 2009 refers to the file, and the outstanding legal fees of $101,329.07 as at 30 September 2009. Mr IA sought reassurance from B that he would be paid although, according to (H), Mr and Mrs CMR's resources had been exhausted. Mr IA indicated he could not keep acting if he was not going to be paid, and expressed the view that "it would be a great pity if the position that we have achieved were to be prejudiced" because the money had run out.

[48] Ms AG referred to another visit to Mr and Mrs CMR's home on 28 October 2009, for which Mr IA is said to have charged $1,000 for the three hours he spent there. By that stage (H) had been served with proceedings, and Mr IA sought

[12] Letter AG to Legal Complaints Service (4 April 2011) at [7.2].

instructions directly from Mr and Mrs CMR as to whether the proceeding was to be defended. Mr IA says that Mr and Mrs CMR offered to pay $25,000 on account of fees for (H)'s defence. The visit is said to have left Mr and Mrs CMR frightened and distressed.[13] This meeting seems to have been the only occasion of direct contact between Mr IA and Mr and Mrs CMR.

[49] The next day, when Mr IA contacted Mr and Mrs CMR in the morning to confirm arrangements for the opposition documents and secure his fees, they advised him they would not be funding (H)'s defence. It appears (H) had decided to declare himself bankrupt, so Mr and Mrs CMR had decided not to contribute further to his fees.

[50] The parties were unable to resolve the question of Mr IA'S unpaid fees.

[51] Ms AG requested a full refund and compensation as well as a referral of Mr IA to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) to protect the public. The CMRs considered Mr IA should be struck off.

[52] Mr IA objected to new matters being raised in the course of Ms AG's submissions in the reconsideration process.

[53] The Committee appointed an investigator and a costs assessor.

[54] The investigator and costs assessor met with Mr IA and his lawyer on 9 August 2013.

[55] In the course of the inquiry process Mr IA raised a number of concerns, including that the integrity of his files had been compromised while they were out of his possession. He alleged that the costs assessor was biased.

[56] The Committee did not consider the costs assessor was biased. With assistance from her report, and two reports by the investigator, the Committee reconsidered Mr IA's conduct and his fees, and made the determination that is the subject of this review on 29 June 2015.

[57] By that stage, Mr IA had been struck off the roll of barristers and solicitors for misconduct arising from unrelated matters. He had also filed for bankruptcy.

[58] The Committee decided to take no further action with respect to the issues listed at paragraph [44] of the decision, and focused instead on:

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[13] Letter AG to LCRO (26 January 2012) at 2.

(a) whether Mr IA had initiated the retainer with Mr and Mrs CMR such that they assumed liability for (H)'s costs;

(b) whether the terms of engagement Mr IA issued to Mr and Mrs CMR dated 18 June 2009 were adequate in the circumstances;

(c) whether the terms of engagement entitled Mr and Mrs CMR to believe that Mr IA was protecting their interests, separate from (H)'s;

(d) whether Mr IA should have ensured that Mr and Mrs CMR obtained independent legal advice before they assumed liability for (H)'s fees;

(e) whether Mr IA had conflicting duties in acting for (H) and his parents;

(f) whether Mr IA had contravened the rules around conflict of interest;

(g) whether Mr IA had otherwise failed to address conflicting duties in such a manner as to amount to unsatisfactory conduct or misconduct;

(h) issues arising around Mr IA's fees, including whether he was aware Mr and Mrs CMR had a maximum amount that they could afford to contribute to (H)'s legal costs;

(i) if Mr IA did know that, whether the terms of engagement should have recorded a fee;

(j) whether Mr IA's invoices were rendered appropriately in light of that;

(k) whether Mr IA's fees were fair and reasonable for the services he had provided pursuant to rule 9.1;

(l) whether Mr IA had continued to charge Mr and Mrs CMR for services after their money had run out;

(m) whether Mr IA gave adequate advice to Mr and Mrs CMR about fees;

(n) whether Mr IA exploited Mr and Mrs CMR's trust in him;

(o) whether Mr IA's conduct either separately or together constituted unsatisfactory conduct, or conduct that should be referred to the Tribunal.

[59] The Committee decided to take no further action in relation to allegations of solicitation, misleading the CMRs, conflicts of interest, pressuring Mr and Mrs CMR into

paying more fees in October, misleading the mediator and the Committee, leaving private documents unattended in a public place and creating needless difficulty over releasing files at the end of the retainer.

[60] However, the Committee determined that there had been unsatisfactory conduct on Mr IA's part. It considered his conduct was high-end unsatisfactory conduct, and made six separate findings. The Committee would have referred his conduct to the Tribunal if he were not already struck off.

[61] The areas of concern to the Committee related to inadequacies in the letter of engagement particularly as to the description of the services Mr IA would provide, and who he would provide the services to, i.e. Mr and Mrs CMR rather than (H).

[62] The Committee imposed orders censuring Mr IA and requiring him to write off the balance of his fees up to $107,000, cancel and refund fees to give effect to that order, pay a fine of $15,000 to the New Zealand Law Society and costs of $10,000.

[63] The Committee considered the letter of engagement should have explained Mr and Mrs CMR would be funding (H)'s fees and that the financial assistance they would be providing should have been the subject of legal advice.

[64] Mr IA's view that (H) and his parents shared the same interests was the subject of some criticism. The divergence between their interests was described in terms of the financial burden assumed by Mr and Mrs CMR, to their own disadvantage, the only benefits being helping (H) out and supporting the family's business interests.

[65] Mr IA'S conflicting duties in the sense of him being paid and the CMRs being obliged to pay him were considered, in connection with the deficiencies the Committee had identified in the letter of engagement.

[66] The Committee considered Mr IA's conduct was lacking in competence and diligence and would be regarded by lawyers of good standing as unacceptable. Unsatisfactory conduct determinations were made pursuant to s 12(a) and (b).

[67] Second, the Committee considered Mr IA should have advised Mr and Mrs CMR to seek independent legal advice before he agreed to act. His failure to do so in all the circumstances was found to be conduct unbecoming of a lawyer and therefore unsatisfactory conduct pursuant to s 12(b)(ii).

[68] The Committee referred to "scathing criticisms" of Mr IA in the investigator's report around his failure to ensure Mr and Mrs CMR received independent legal advice

before agreeing to cover (H)'s legal costs. The Committee "entirely agreed" with the investigator's comments.[14]

[69] The Committee considered Mr IA should have personally liaised with Mr and Mrs CMR before accepting the position as conveyed to him by (H), primarily because (H) was to be the beneficiary of his parents' largesse. The Committee considered Mr IA should have been more wary of the arrangements (H) required and more protective of Mr and Mrs CMR's interests. He should have made his own enquiries, even though he knew from previous dealings with Mr and Mrs CMR that they were committed to supporting (H).

[70] The Committee noted that Mr IA could have been prohibited from acting for Mr and Mrs CMR and (H) even if he had prior informed consent from all of them. It did not consider that he had protected or promoted Mr or Mrs CMR's interests.

[71] The Committee concluded Mr IA had contravened rules 6 and 6.1 which fell within the definition of unsatisfactory conduct in s 12(c), and that his conduct would be regarded as unacceptable by lawyers of good standing, which fell within the definition of unsatisfactory conduct in s 12(b).

[72] Third, the Committee considered whether Mr IA relying on (H) to communicate with his clients was sufficient to discharge his obligations to Mr and Mrs CMR. The Committee's view was that Mr IA should at least have had instructions directly from Mr and Mrs CMR confirming he was to direct all communications with them to (H).

[73] The Committee's view was that Mr IA had not met the minimum standards of communication required by rules 7 and 7.1, and would be regarded by lawyers of good standing as being unacceptable. The definitions in s 12(b) and (c) were met.

[74] Fourth, the Committee considered whether Mr IA's fees were fair and reasonable, with assistance from a costs assessor's report. Mr IA had rendered 17 invoices charging $266,445 in fees. The costs assessor considered the fee should have been $159,425 in the round, and the Committee agreed, noting the report was thorough enough for its purposes. The Committee decided Mr IA had contravened rules 9 and 9.1, which was unsatisfactory conduct pursuant to s 12(c).

[75] Overall the Committee's view was that it could have laid charges against Mr IA in the Tribunal, but he was already struck off.

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[14] Standards Committee decision (29 June 2015) at [88].

[76] The Committee gave Mr IA 30 working days to comply with the orders, deferred consideration of publication of Mr IA's name, and certified Mr IA's fees had been reduced and paid in full.

Application for review

[77] Mr IA objected to the decision and applied for a review. He asserts the decision is wrong in fact and law, and contends that the unsatisfactory conduct findings should be reversed.

[78] Mr IA challenges the reports provided by the investigator and the costs assessor.

[79] Mr IA does not accept there was a conflict of interest or duties, or that interests or duties were breached.

[80] Mr IA does not accept that he should have advised Mr and Mrs CMR to seek independent advice. He says that the terms of engagement were adequate in the circumstances, and provided for the protection of Mr and Mrs CMR's interests.

[81] Mr IA remains firmly convinced that apparent bias precluded the costs assessor from being involved in inquiries relating to him.

[82] In support of his application Mr IA provided a letter setting out the detail of the documents upon which his application for review relied.

[83] By 18 October 2016 Mr IA was corresponding with the LCRO on the basis that he, the former partners and staff of (the firm) were all participants in the application for review.

[84] Mr IA emphasised the primacy of his relationship with (H), rather than (H)'s parents, and requested various materials and an opportunity to inspect his own files.

[85] Mr IA says Mr CMR had passed away, and says that (H) was, throughout the retainer, the authorised agent of his parents.

Review grounds

[86] The grounds for review are:

(a) The decision of the Standards Committee is wrong both in fact and law. Mr IA disputes all of the Committee's finding of unsatisfactory conduct.

(b) The Committee erroneously relied on the defective report of the investigator which arose from an unbalanced and incomplete investigation, and is based on a fundamental misunderstanding as to the nature and scope of the legal services the complainants wanted and that the firm agreed to provide.

(c) The firm's fees were in accordance with the agreed terms of the retainer, and instructions received.

(d) There was neither a conflict of interest or duties.

(e) There were neither breaches of duties or interests.

(f) The manner of communication as between the firm and Mr and Mrs CMR as agreed by them was instructed by (H).

(g) It is disputed both in fact and in law that Mr and Mrs CMR ought to have been advised to seek independent advice.

(h) The terms of engagement were adequate in the circumstances and provided for Mr and Mrs CMRs' interests to be protected.

(i) The Complaints Service wrongly rejected the firm's claim of apparent bias as against the investigator.

[87] Mr IA provided a detailed list of questions he wanted this Office to put to (H) under oath, and statements from others at (the firm) including Mr SL who assisted Mr IA in carrying out (H)'s instructions.

(H)'s responses

[88] (H)'s various responses remained critical of Mr IA. He repeated his allegation Mr IA had deducted funds from his trust account to pay his fees without Mr and Mrs CMR's written authority. (H) provided correspondence exonerating him on SFO charges which resulted in his business partners being convicted on various charges relating to company business.

Review hearing

[89] Mr IA attended an applicant only hearing on 27 February 2017 together with staff from the firm. (H) and B also attended the review hearing, although their participation was very limited.

Nature and scope of review

[90] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[15]

> … 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" …
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> … 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.

[91] More recently, the High Court has described a review by this Office in the following way:[16]

> 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.

[92] 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 relevant materials afresh, including the Committee's decision; and

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

Review process

[93] In the course of the first Committee process the parties entered into a settlement agreement. The CMRs have had the benefit of that agreement. Mr IA has

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[15] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].
[16] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

written off around a third of the fees he originally charged, and released the files over which he had claimed a lien to secure payment of his costs.

[94] The focus of the Act is on consumer protection. In administering the provisions of the Act, a balance is to be struck. The right of complainants to complain, the right of the practitioner concerned to defend him or herself, and fairness and finality in the statutory process are all a part of that exercise. Review is a process which the High Court has described as "informal, inquisitorial and robust". The process of review under the Act does not call for a detailed forensic analysis of everything that occurred in the course of the retainer. This review focuses on the evidence of Mr IA's conduct before the complaint was made. That evidence is largely contained in the letters of engagement, the invoices and timesheets, and materials the parties have identified as relevant from Mr IA's files.

[95] In the course of the review Mr IA inspected those of his files which are held by this Office. It is acknowledged that those files have not been held securely under Mr IA's control at all times. Mr IA was provided with the copies he requested.

[96] Mr IA wanted to know whether the Complaints Service investigator had a file, and if so, to inspect it. This Office made that enquiry. The investigator confirmed he had no such file. Mr IA also wanted to see any file held by the Complaints Service costs assessor. This Office requested any such file. The costs assessor confirmed that the only materials she had retained were administrative. This Office advised Mr IA accordingly.

[97] I have not scrutinised all of Mr IA's files, but I have carefully considered the other materials available on review.

Analysis

The Act

[98] The disciplinary provisions of the Act are to be applied according to the purposes of the Act, which relevantly are:

(a) to maintain public confidence in the provision of legal services;

(b) to protect the consumers of legal services;

(c) to recognise the status of the legal profession.

[99] Pursuant to s 4 of the Act, every lawyer who provides regulated services must, in the course of his practice, comply with the following fundamental obligations:

(a) to uphold the rule of law and to facilitate the administration of justice in New Zealand;

(b) to be independent in providing regulated services to its clients;

(c) to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients;

(d) to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

[100] Misconduct and unsatisfactory conduct are defined in the Act. This Office lacks the jurisdiction to determine allegations of misconduct. Those are dealt with by the Tribunal. The jurisdiction of this Office, and of Committees, extends to determining whether there has been unsatisfactory conduct, within the definitions set out in s 12 of the Act, on the part of the practitioner.

[101] Section 12 says unsatisfactory conduct in relation to a lawyer means:

(a) 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; or

(b) conduct of the lawyer… that occurs at a time when he … is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including –

(i) conduct unbecoming a lawyer … ; or

(ii) unprofessional conduct; or

(c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer … or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7) …

[102] The three key areas of concern on review relate to Mr IA's professional responsibility regarding the arrangements to secure his fees; his professional obligations around termination of the retainer; and whether his fees were fair and reasonable.

Securing fees

[103] At the heart of the CMRs' complaint is the sense that Mr IA betrayed the trust the CMRs reposed in him. They came to feel he had taken advantage of them while they were distressed and vulnerable, and then sought to charge them a significant amount of money for availing themselves of his expertise.

[104] Arguments about duress and unconscionability cannot be resolved by this Office in this jurisdiction. That (H) was in a dire predicament is not in dispute. His business affairs and financial position were far from straightforward, and he knew little about them. He needed skilled professional help.

[105] There is nothing in the information I have seen to suggest that Mr IA and his colleagues provided anything less than that, or that Mr IA acted other than in general accordance with the instructions he received. As details of (H)'s financial position emerged it became increasingly apparent to Mr IA that he may not be paid by (H). However, he should have communicated directly with Mr and Mrs CMR before he committed to continuing to act.

[106] The first letter of engagement, to (H), was late. Mr IA had already provided substantial legal services. Mr IA had billed (H), but believed he had no money, and some fairly significant potential liabilities. Although Mr IA's concern for his own position was no different to the concerns of any other creditor, he knew a way to limit his risk. Based on what Mr IA says is a common practice when acting for the indebted, he sought to secure his fees in reliance on Mr and Mrs CMR paying them.

[107] There does not appear to be any way around the conclusion that Mr IA should have advised Mr and Mrs CMR that each of them had the right to receive independent advice before instructing him.

[108] He could have declined to act because rule 5.4 prohibited him from acting if there was a conflict or a risk of a conflict between his interests and the CMRs', or CMR family, for whom he was proposing to act. Rule 5.4.3 prohibited Mr IA from entering into a financial relationship with Mr or Mrs CMR if there was at the time a possibility of the relationship of confidence and trust between him and either of them being compromised. Communicating only through (H) did little to manage those risks. Mr IA's conduct was inconsistent with rule 5.4.4, which underpins the concerns expressed by the Committee in relation to the first three determinations of unsatisfactory conduct, and is consistent with the Committee's determination that Mr IA contravened rule 6 and 6.1.

[109] It is harder to reconcile a contravention of those rules with circumstances where (H)'s parents probably were willing to help him out to some extent. Mr IA's conduct in failing to encourage Mr and Mrs CMR directly to seek independent advice on either footing would be regarded as unacceptable by lawyers of good standing as unprofessional, conduct unbecoming a lawyer and in contravention of rules 5 and 6.

[110] My view is not inconsistent with the Committee's, that there was unsatisfactory conduct on Mr IA'S part within the definitions in ss 12, (b), (b)(i), (b)(ii) and (c) of the Act.

Termination of retainer

[111] There is some debate between the CMRs and Mr IA over the termination of the retainer. Ms AG contends Mr IA was told in August that Mr and Mrs CMR had used up the money they had earmarked to assist (H) out of his difficulties, and by October had told him they would not pay more. Nonetheless, Mr IA continued providing legal services and charging fees until December. In terms of the original complaint, Mr IA would have had to adapt his strategy, particularly if he was receiving signals that the retainer was coming to an end.

[112] Without evidence from Mr or Mrs CMR, the best evidence of when the retainer ended is Mr IA's invoices.

[113] Rule 4.2 required Mr IA to complete the regulated services required by the CMRs under the retainer unless they discharged him from the engagement or they all agreed he would no longer act.

[114] Mr IA eventually terminated the retainer unilaterally for good cause and after giving reasonable notice to the CMRs specifying the grounds for termination. Even if he had a good cause, e.g. the CMRs not making arrangements satisfactory to him for payment of his costs, Mr IA was still required to have due regard to his fiduciary duties to (H).

[115] Having begun to act, even if he might not be paid, the complexity of (H)'s legal position meant Mr IA could not just stop acting. That point does not appear to have been acknowledged by the CMRs. It is not clear that Mr IA could readily have dropped out of retainer. Handover could well have been time consuming and difficult to manage. In that sense Mr IA was over committed, largely because he had under-managed the start of the retainer, with the delay in providing information pursuant to rules 3.4, 45.5 being unsatisfactory.

[116] As a consequence of Mr IA's not having attended to his obligations relating to the prompt provision of information at the start, and Mr and Mrs CMR not having independent advice, the biggest single difficulty that then arose in the course of the retainer was how to agree the value of the services Mr IA provided while the relationship with the CMRs was breaking down. However, there is no evidential basis on which to find that Mr IA terminated the retainer improperly.

Fees

[117] The fee Mr IA eventually charged for all the matters he assisted (H) with came to $266,445. That is a significant amount for any practitioner to have to justify as a fair and reasonable fee chargeable to private clients, even clients of some substance, as it appears Mr and Mrs CMR were.

[118] The narrations to Mr IA's invoices record the attendances charged in each case.

[119] All of the services were provided on (H)'s instructions except for the one exception mentioned above. Many of the matters Mr IA dealt with for (H) related to discrete matters. The approach usually taken by this Office is to consider the totality of each matter, in the sense that it is the whole fee charged by a lawyer for the services provided in each matter, where there is a sufficient relationship between the invoices and a particular matter.

[120] On review, the fees for each discrete matter have been aggregated and considered as an alternative to cross-check the Committee's approach.

[121] Mr IA issued invoices for services provided in relation to nine matters as follows:

File number	Matter description	Date	Invoice Number	Amount	File Total
14979/1	CMR (1969) Ltd (in Liq)	31/05/09	3303	$33,050.00	
10727/1	[Business 1] (in Liq)	26/06/09	3311	$38,360.00	
	[Business 2] Ltd (in Liq)	31/06/09	4008	$34,105.00	
	General Attendances	31/08/09	3322	$46,485.00	
		30/09/09	3328	$15,960.00	
					$167,960.00
14979/13	[ZZ]v CMR	29/05/09	3301	$2,815.00	
					$2,815.00
10727/5	CMR – [YY] Estate Property Syndicate – [JJ] Road, [Suburb]	19/06/09	3310A	$4,215.00	
					$4,215.00
10727/16	CMR 1969 Ltd (in Liq) –	13/0709	3316	$22,360.00	

	[XX] (1980) Ltd – agreement for sale and purchase dated 20 November 2008	31/07/09	3317	$3,135.00	
					$25,495.00
10727/17	CMR	27/08/09	3321	$9,030.00	
	[GG]td (formerly [BB] Ltd	03/11/09	4031	$2,590.00	
	[CC] Finance Ltd [J] Holdings Ltd [XX] Finance Ltd Credit Contracts				**$11,620.00**
10727/18	CMR – [ZB] (NZ) Ltd	30/06/09	3315	$7,305.00	
		27/08/09	3320	$8,300.00	
		30/09/09	3329	$4,620.00	
		20/11/09	4029	$29,200.00	
					$49,425.00
10727/20	Inland Revenue Department – Employer Deductions	31/08/09	3323	$2,815.00	
					$2,815.00
10727/22	CMR	28/08/09	3324	$2,100.00	
	[Business 2] Ltd (in Liq) Trademark "[Business 1]"				**$2,100.00**

[122] The vast majority of time was recorded to files 14979/1 and 10727/1. These general matters are the only matters where concern arises over the amount of Mr IA's fees. The fees on the other files are fair and reasonable for the services provided.

[123] Mr IA charged a total of $167,960 for the general services he provided.

[124] Since the fees were charged, the parties have determined quantum by agreement, Mr CMR has passed on, and Mr IA has been struck off and made bankrupt. In the circumstances it is not necessary to attempt the difficult task of quantification, nor is it necessary to be overly concerned with the allegations levelled against the costs assessor and investigator which do not appear to have a particularly sound basis.

[125] The issue around fees turns on fairness. Was it fair for Mr IA to have charged fees of $266,445 when he should not have allowed Mr or Mrs CMR pay his fees until they had each received independent advice and had not complied with rules 3.4 and 3.5? It was not fair to charge Mr and Mrs CMR a fee of that amount, and Mr IA recognised that by reducing his fees in the course of the mediation. The agreed fee is the fair fee. It is also a reasonable one for the time and labour expended, taking into account the other relevant factors.

[126] It follows that $266,445 was not a fair and reasonable fee. By charging a fee at that level Mr IA contravened rules 9 and 9.1. That is conduct which, in all the circumstances, could fall within the definition of misconduct in s 7(1)(a)(i) or (iv), but for

the purposes of this review, is conduct that falls within the definition in s 12(c) of the Act.

Summary

[127] There has been unsatisfactory conduct on Mr IA's part in that he:

(a) contravened rules 3.4 and 3.5 by failing to provide the required information;

(b) agreed to Mr and Mrs CMR paying (H)'s legal fees without communicating directly with them or recommending they seek independent advice; and

(c) charged a fee that was not fair and reasonable.

[128] For the reasons discussed above, that conduct falls within the definitions of unsatisfactory conduct in s 12(b), (b)(i), (b)(ii) and (c).

[129] The Committee's decision is modified accordingly.

Orders

[130] There is no good reason to interfere with the orders made pursuant to s 156. Those are confirmed.

Publication

[131] Pursuant to s 206(4) of the Act this Office may direct publication of its decision where that is necessary or desirable, in the public interest. The focus is on protecting the public.

[132] Mr IA has been struck off. He no longer practises as a lawyer. He would encounter barriers before being able to practise as a lawyer again. His disciplinary history, including this decision, would fall under scrutiny. That is how the public interest would be protected.

[133] I do not consider it necessary or desirable in the public interest to publish Mr IA'S name. The Standards Committee's publication decision is therefore reversed and a direction made to publish this decision with identifying details of the parties removed.

Costs

[134] Section 210 of the Act allows the LCRO discretion to order the payment of costs.

[135] The review was of average complexity. Mr IA requested a hearing in person. Mr IA'S application did not result in all of the determinations that there had been unsatisfactory conduct on his part being reversed.

[136] In the circumstances an order that Mr IA pay costs of $1,600 is made pursuant to s 210 of the Act.

Decision

[137] Pursuant to ss 211(1)(a) and 12(a), (b) and (c) of the Lawyers and Conveyancers Act 2006, the Standards Committee's decision dated 29 June 2015 is modified to record there has been unsatisfactory conduct on the part of Mr IA pursuant to ss 12(b), (b)(i), (b)(ii), and (c), for the reasons set out.

[138] Pursuant to s 211(1)(a) of the Act, the Standards Committee decision on publication dated 25 February 2016 is reversed.

[139] Pursuant to s 210 of the Act Mr IA is ordered to pay costs of $1,600 to the New Zealand Law Society within 28 days of the date of this decision.

DATED this 31st day of July 2017

D Thresher
Legal Complaints Review Officer

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

Mr IA as the Applicant
CMR as the Respondent
[City]Standards Committee [X]
The New Zealand Law Society