LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 182

LCRO 162/2018

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
BETWEEN	**BQ** Applicant
AND	**XR** Respondent

DECISION

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

Introduction

[1] Mr BQ has applied for a review of a decision by the [Area] Standards Committee (the Committee) which, following completion of an investigation into complaints made by Mr XR, made a finding of unsatisfactory conduct against Mr BQ.

Background

[2] Mr XR separated from his partner.[1]

[1] I may refer to Mr XR's former partner in this decision as "partner" for convenience, or as Ms X in correspondence quoted.

[3] In December 2016, Mr XR instructed Mr BQ to act for him to assist with resolving relationship property issues that had arisen subsequent to the separation.

[4] Mr XR and his partner had previously entered into a contracting out agreement under s 21 of the Property (Relationships) Act 1976 (the s 21 agreement). Mr BQ was provided with a copy of the agreement.

[5] The agreement provided a mechanism for the parties, in the event of separation, to calculate their respective shares in a residential property situated at [address], [town] (the "[town] property").

[6] The agreement also identified property which the parties had agreed would remain their separate property in the event of separation, and recorded that Mr XR was to be responsible for meeting the mortgage payments on the [town] property.

[7] On 20 December 2016, Mr BQ sent a letter of engagement to Mr XR. Amongst the information contained in this letter of engagement, was advice concerning Mr BQ's charge out rate. He confirmed that his charge out rate was $395.00 per hour but noted that it was "likely that the above hourly rates will be reviewed as at 1 April in each year."

[8] Over the following months, the parties endeavoured to reach agreement on settlement of all property issues, but were unable to do so.

[9] Mr BQ provided two invoices to Mr XR, the first dated 30 March 2017 for $2,880.00 and the second dated 26 July 2017 in the sum of $9,785.00 (inclusive of GST and disbursements).

[10] Mr XR terminated the retainer shortly after receipt of the second invoice.

[11] Property issues had not been resolved at the time Mr XR terminated his retainer with Mr BQ.

[12] Mr XR paid the first invoice but not the second.

[13] Mr XR instructed a new lawyer. Settlement of relationship property matters with his former partner was achieved, seemingly without the terms of the settlement being recorded in a relationship property agreement.

The complaint and the Standards Committee decision

[14] Mr XR lodged a complaint with the New Zealand Law Society Complaints Service (NZLS), on 9 October 2017. The substance of Mr XR's complaint was that:

(a) Mr BQ's total fees were disproportionate to services received; and

(b) Mr BQ's cumbersome approach to dealing with his case had complicated matters and made the resolution of what was essentially a straightforward matter difficult; and

(c) he had lost trust and confidence in Mr BQ; and

(d) Mr BQ's advancing of three different settlement scenarios had wasted time and caused confusion to Mr XR; and

(e) he had not been provided with an estimate of time or costs; and

(f) he had received minimal value for the costs incurred; and

(g) there was no clear direction in the negotiations; and

(h) Mr BQ's information and advice was conflicting and erratic; and

(i) some of the work undertaken by Mr BQ was unnecessary, particularly the drafting and amending of the relationship property agreement.

[15] Mr BQ responded in an email dated 28 November 2017.

[16] He prefaced his response with indication that he'd had difficulty making sense of the complaint and made request of the Complaints Service to ask Mr XR to clarify it. Pending that clarification, he provided response on the basis of "what he assumes to be the complaint". Mr BQ submitted that:

(a) his fees were not only reasonable but were concessionary; and

(b) it was his practice to provide his timesheet records directly to clients; and

(c) he had sent Mr XR two bills of costs; and

(d) his second account was reduced from $9,266 plus GST (based on recorded time) to $8,500 plus GST; and

(e) a considerable amount of time had needed to be spent on the matter primarily because of Mr XR's approach; and

(f) he had not been responsible for spending of any excessive time on the file; and

(g) he had counselled Mr XR (with a view to limiting costs) to settle but Mr XR did not favour this approach; and

(h) Mr XR seemed to want to "dig in for a fight" and on occasions ignored his advice, this leading to an escalation in fees; and

(i) he and opposing counsel had applied different methodologies and legal interpretations to the division of relationship property and how this was to be achieved; and

(j) he attempts, when communicating with clients, to couch his correspondence in layman's language where possible and if Mr XR had told him he didn't want to receive, or didn't understand information that was being provided, Mr BQ would have refrained from forwarding information to him; and

(k) It is difficult to provide an estimate of time and costs for such files, as positions taken in the course of negotiations can vary; and

(l) he had provided Mr XR with a letter of engagement, and this set out the billing framework; and

(m) he disputes that information and advice provided to Mr XR was "erratic"; and

(n) the reason why he drafted the agreement was because he thought the parties were very close to concluding negotiations.

[17] Mr XR provided further response in correspondence of 20 January 2018. The substance of his response was:

(a) his concerns were with the "massive invoice" (the second invoice); and

(b) the time records indicate that Mr BQ updated the relationship property agreement more than 20 times; and

(c) costs incurred in updating the agreement were $5,394 excluding GST, a figure he considered to be unreasonable; and

(d) he remains dissatisfied with the way Mr BQ dealt with the file and as evidence of this, notes the different methodologies adopted by Mr BQ, the timing of requests for information, and;

(e) he felt coerced into settlement when that was not in his interests; and

(f) his new lawyer helped him achieve a settlement on far more favourable terms than those which Mr BQ had proposed; and

(g) He disputes that he had ignored Mr BQ's advice.

[18] The Standards Committee initially considered the matter on 7 February 2018, following which request was made of Mr BQ to provide further clarification as to the time spent on drafting the relationship property agreement.

[19] Mr BQ responded on 20 March 2018. He referred to his previous comments concerning the drafting of the agreement referenced in his correspondence of 28 November 2017. He noted that a significant amount of the time recorded as having been spent on drafting and amending the agreement, incorporated other attendances. He submitted a chronology and details of the drafting of the agreement (alleging that some updates were asked for by Mr XR) together with a copy of his timesheets with relevant entries highlighted.

[20] On 25 May 2018, Mr BQ emailed further comprehensive submissions to the Committee in which he provided amplification of the earlier arguments made.

[21] The Committee identified the following issues for consideration:

(a) Did Mr BQ advise Mr XR that his hourly rate would increase from $395 p/hr plus GST to $420 p/hr plus GST after the 1 April review.

(b) Were Mr BQ's fees fair and reasonable for the services provided and the outcome achieved.

[22] The Standards Committee delivered its decision on 17 August 2018.

[23] The Committee determined that there had been unsatisfactory conduct pursuant to s 152(2)(b)(i) of the Lawyers and Conveyancers Act 2006 (the Act). The Committee ordered:

(a) Mr BQ reduce his fee to Mr XR by the sum of $4,000, pursuant to s 156(1)(e) of the Act.

(b) Mr BQ pay costs to NZLS in the sum of $500 pursuant to s 156(1)(n) of the Act.

[24] In reaching that decision the Committee concluded that Mr BQ's handling of Mr XR's property relationships matters, as it related solely to the drafting and frequent editing of the agreement, fell short of the standard of competence that could be expected of a reasonably competent lawyer practicing in the field of relationship property.

Application for review

[25] Mr BQ filed an application for review on 30 August 2018.

[26] His review application was comprehensive and supported by an 18 page submission. His arguments may be summarised as follows:

(a) his letter of engagement explains that his charge out rate was subject to review; and

(b) it was the Committee, not Mr XR, who raised this issue; and

(c) there was no pre-emptive drafting of the agreement; and

(d) when he first started drafting the parties were very close to an agreement and some drafting had been carried out on Mr XR's instructions; and

(e) the fact that the parties had signed an earlier agreement, during their relationship provides an important context for the decisions made; and

(f) the dispute over mortgage payments significantly contributed to time spent on the file; and

(g) he was required to check a substantial amount of documentation; and

(h) Mr XR provided conflicting instructions; and

(i) he questioned the competence of the Committee responsible for making the decision.

[27] The outcome sought by Mr BQ is for the Committee's decision to be reversed.

[28] Mr XR was invited to comment on Mr BQ's review application. On 1 October 2018, Mr XR advised that:

(a) he relied in large part on his earlier submissions;

(b) on balance, he had decided to accept the Committee's decision and not apply for a review himself however now that Mr BQ had applied, he wished to avail himself of the opportunity to comment; and

(c) Mr BQ had mixed up dates and events; and

(d) Mr BQ was attempting to portray him in a bad light; and

(e) He takes issue with Mr BQ's recollection of events.

Review on the papers

[29] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[30] I record that having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[31] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[2]

> … 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

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

> 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.

[32] More recently, the High Court has described a review by this Office in the following way:[3]

> 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.

[33] 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.

Analysis

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

(a) Did the fee charged by Mr BQ exceed what would have been considered reasonable as a consequence of a persistent refusal by Mr XR to accept advice that would, if followed, had brought the matter to a more expeditious resolution resulting in a lower fee for Mr XR?

(b) Were the fees charged fair and reasonable?

Did the fee charged by Mr BQ exceed what would have been considered reasonable as a consequence of a persistent refusal by Mr XR to accept advice that would, if followed, had brought the matter to a more expeditious resolution resulting in a lower fee for Mr XR?

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

[35] Whilst the Committee focused on the question as to whether the fees charged were fair and reasonable with particular attention paid to the time spent on drafting the proposed settlement agreement (the s 21A agreement), a comprehensive consideration of the fee charged demands attention to the broader raft of issues that were raised by Mr XR. An examination of those issues is critical to the question of determining the fairness and reasonableness of the fee charged by Mr BQ.

[36] Whilst Mr XR's concerns regarding the fees charged placed particular focus on the time spent by Mr BQ in drafting and amending the agreement, his concerns were not solely confined to criticism that Mr BQ had spent an excessive amount of time working on the agreement.

[37] Pivotal to Mr XR's complaint was allegation that Mr BQ had failed, throughout the course of the retainer, to provide clear direction on the case. Mr XR believed that despite his case engaging what he considered to be a single relatively straightforward issue, Mr BQ continually diverted focus from this issue. In particular, Mr XR was concerned that Mr BQ became unduly focused on addressing alternative methodologies for calculating the parties' respective interests in the [Town] property. This, in Mr XR's view, hampered the parties' attempts to arrive at a settlement.

[38] Mr XR complained that Mr BQ frequently gave him information and material that was difficult for him to understand. He was particularly critical that Mr BQ had, on occasions, provided him with various extracts from the Relationship Property legislation and, when doing so, had invited Mr XR to interpret the legislation and assess its relevance to his case.

[39] It was Mr XR's view that it was Mr BQ's obligation to assess the particular facts of his case, and apply those facts to the relevant legislation, rather than to shift responsibility for deciding whether a particular legal approach was viable to Mr XR.

[40] Whilst Mr XR was particularly critical of the time that Mr BQ had spent on drafting and redrafting the property agreement, this criticism was framed in the context of broader complaint that Mr BQ had failed to provide clear and decisive direction on his file and that this had, inevitably in Mr XR's view, resulted in costs being incurred that could have been avoided.

[41] Mr XR emphasised that he and his partner had an agreement in place which dealt with most of the issues that could potentially arise in the event of them separating, and what was left to be dealt with when that separation did occur was relatively straightforward.

[42] Mr BQ rejected suggestion that he had failed to bring a clear and focused approach to advancing Mr XR's case.

[43] Whilst Mr BQ expressed concern on receipt of Mr XR's complaint that he had had difficulty making sense of what Mr XR was complaining about, his comprehensive response to the complaint addressed in detail the various issues identified by Mr XR.

[44] Mr BQ accepted that time required to be spent on the file was "perhaps greater than should have been expected"[4] but he lays responsibility for that squarely at Mr XR's door.

[45] Mr BQ maintains that he advised Mr XR on a number of occasions that it would be in his interest to settle with his partner, but Mr XR refused to take his advice.

[46] He says that his advice to settle was advice that was both cautionary and prudent, and advanced with purpose to ensure that Mr XR understood that engaging in a drawn out argument with his partner would inevitably escalate the costs.

[47] Mr BQ submitted that as Mr XR had refused to follow his advice to settle, Mr XR "… assumed sole responsibility for the additional time which both he and I had put into attempting to resolve all property relationship issues…". [5]

[48] Further, Mr BQ maintains that his ability to achieve a prompt settlement was impeded by Mr XR's failure to provide clear and consistent instructions, and his inability to produce credible evidence to support the claims he was advancing.

[49] Mr BQ is critical of the information that Mr XR provided him.

[50] He notes that Mr XR had initially maintained that he could establish that he had given $45,000 to his former partner which had been used by her to pay down the mortgage, but that he subsequently amended this figure to $20,000.

[51] On that, Mr BQ said this:[6]

> However, I wish to emphasise that the only reason a great deal of time had to be spent on this issue at all is because [law firm], on behalf of [Ms X] raised the issue that she required a reimbursement of "her financial contributions" reducing the mortgage principal sum, and [XR] then (for the first time) instructed me that he had in fact funded all $45,000 of those payments from "cashies" or other undeclared income and subsequently after my focused questioning of him, acknowledged that in fact he may only have contributed $20,000 of the $45,000, with the other $25,000 perhaps having been funded by [Ms X]".

[4] Mr BQ, correspondence to Complaints Service (28 November 2017) at p2.
[5] Mr BQ, correspondence to Complaints Service (28 November 2017) at p3.
[6] Mr BQ, correspondence to Complaints Service (28 November 2017) at p7.

[52] Mr BQ notes that Mr XR had initially suggested that the source of the funds provided to his partner were cash payments received through his business, but later argued that the funds had been gifted to him by his parents.

[53] Mr BQ was critical of the evidence that Mr XR was advancing to support his claim, noting that "Mr XR provided a substantial amount of evidence, but I could not reconcile the evidence provided against the quantum he was claiming".[7]

[54] Mr BQ argued that:[8]

> Effectively, the issue, and therefore the time spent, was caused solely by [Mr XR's] own actions and instructions, and then providing me with evidence supposedly supporting the sum which he argued he had sourced from his own separate property business income and applied towards maintaining or improving the family home, but which evidence provided by [XR] did not tally up to the total he was claiming that he had intermingled.

[55] In summary, Mr BQ whilst accepting that his fee exceeded what would have been expected, justifies the fees charged by argument that he had an obdurate client who was unwilling to take his advice, and who had provided him with conflicting instructions and inadequate evidence.

[56] Against this, Mr XR's argument can be summarised as a concern that Mr BQ failed to provide clear directions, presented him with conflicting options, and charged him for repetitive work that was neither justified nor fruitful.

[57] It is regrettable, but perhaps on occasions inevitable, that in the process of advancing and responding to conduct complaints, the parties' positions can become increasingly entrenched.

[58] However, having given careful consideration to the extensive correspondence that was conducted between the parties during the course of the retainer, I am persuaded that Mr XR and Mr BQ have, in robustly presenting their positions (as they are properly entitled to do) both, to a degree, been unduly critical of the other.

[59] Mr XR, in providing a line by line, unit by unit analysis of Mr BQ's work, pays insufficient regard to the circumstances that Mr BQ was attempting to manage, and in particular, to give sufficient recognition to the fact that Mr BQ was following Mr XR's instructions in attempting to minimise the financial loss Mr XR was likely to suffer as a consequence of his former partner seeking to be compensated for payments made to the mortgage.

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[7] Mr BQ, correspondence to Complaints Service (28 November 2017) at p10.
[8] Mr BQ, correspondence to Complaints Service (28 November 2017) at p10.

[60] With the benefit of hindsight, Mr XR considers his case to have been relatively straightforward and one capable of being promptly resolved.

[61] But it is clear that when it became obvious to Mr XR that he would have difficulty providing evidence to support his claim that he had made significant financial advances to his former partner, he was receptive to, and keen for, Mr BQ to traverse possible options available to minimise his losses.

[62] It is also clear that Mr XR was, when exploring options available which may have provided opportunity for him to recover monies paid to his partner, relying on Mr BQ to advise him if those options were realistic and able to be supported by sound legal argument. His position was indicative of a client who was prepared to advance a claim, but only if he was assured by his lawyer that his claim had reasonable prospect of success.

[63] Whilst Mr XR is critical of Mr BQ embarking, as Mr XR now perceives it to be, on a fruitless series of calculations that came to nothing, that does not allow sufficient consideration to Mr BQ's obligations. These were to ensure that Mr XR was competently advised as to the options available to him. Nor does it pay sufficient heed to Mr XR's determination to try and minimise the cost of what he considered were unfair and unreasonable demands.

[64] Mr XR argues that the earlier agreement had effectively dealt with the majority of matters that needed to be addressed on separation, but Mr BQ was prudent, particularly in circumstances when Mr XR's partner sought a significant departure from the terms of the first agreement, to consider the interrelationship between the earlier agreement and the Property (Relationships) Act. It was essential that he address issues such as whether there had been an intermingling of separate property.

[65] The question, in my view, is not whether Mr BQ was required to provide this overview (he was) but rather whether in doing so he provided competent and clear advice to Mr XR.

[66] Mr BQ argues that it is not the role of a Standards Committee (or a Review Officer) to make determinations on matters of law.

[67] I accept Mr BQ's argument that it is not the role of a Review Officer to make determinations on the legal issues that were pivotal to Mr XR's case, but an examination of whether a lawyer has competently represented their client, is properly a matter that may be the subject of a conduct inquiry

[68] Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), directs that in providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[69] In advancing his position that Mr BQ got nowhere, and to reinforce argument that his case was relatively straightforward, Mr XR says that the lawyer he engaged subsequent to Mr BQ was critical of aspects of the approach adopted by Mr BQ, and able to progress the matter to a settlement on terms that were considerably more advantageous to Mr XR, than what Mr BQ had been encouraging him to settle on.

[70] I give no weight to argument that Mr BQ's advice was the subject of criticism from Mr XR's new lawyer. There is no evidence from his lawyer explaining where Mr BQ is said to have erred. Nor are the full circumstances surrounding the settlement reached known.

[71] To the extent that Mr XR's account of what transpired following the termination of the retainer is relevant to this inquiry, Mr XR's indication that his partner was prepared to accept a lesser sum indicates that there did ultimately appear to be room for negotiation. But there is nothing during the period of Mr BQ's stewardship of his file to suggest that Mr XR's former partner was anything other than resolute in her position that she would not compromise.

[72] Turning to Mr BQ's argument (that Mr XR was unwilling to take his advice), I am not persuaded that Mr XR was so inflexible and insistent in his position that Mr BQ had no option but to plough on.

[73] Nor am I persuaded that Mr XR, in advancing his argument for compensation and in providing evidence to support that argument, was, as suggested by Mr BQ, the author of his own misfortune.

[74] Complaint that Mr XR was inflexible, resistant to taking advice, and obdurately advancing argument that had little prospect of success, does not reconcile with the evidence of the extensive exchanges between Mr BQ and Mr XR. Those exchanges in large part, give indication that Mr XR, whilst firm in his view that his partner's claim was unreasonable, was looking to Mr BQ for guidance and prepared and willing to settle if advised that he had little prospect of successfully mounting a defence to his former partner's claim.

[75] As Mr BQ's criticisms of Mr XR impact directly on the question as to whether fees charged were fair and reasonable, a more detailed analysis of that criticism is necessary.

[76] It is clear that from the outset that Mr BQ considered that it would be appropriate to have the terms of the separation recorded in a relationship property agreement.

[77] He advised Mr XR a formal agreement would ensure that his position was better protected and put him less at risk of the terms of the separation being vulnerable to later challenge.

[78] I think it reasonable for Mr BQ to have adopted that view. His approach presents as conventional. Mr BQ had formed a view that terms of the earlier s 21 agreement were favourable to Mr XR, and that he thought it prudent to ensure that the terms of a final settlement were properly recorded in a s 21A agreement. His decision to take steps to formalise a final agreement presented as understandable.

[79] Whilst Mr XR's later lawyer may have considered it unnecessary for a further agreement to be drafted, the approach adopted by Mr BQ could not be considered in any way contentious, and was one that many lawyers may have adopted. It was not a decision that would raise the spectre of any conduct issues.

[80] That said, it could reasonably have been expected that Mr BQ would have been able to build on the architecture of the earlier agreement and to have utilised the accord reached in that agreement. This would have ensured that work needed to be done on the s 21A agreement was not required to have been as comprehensive as if he was starting from scratch.

[81] Mr BQ's approach from commencement was to proceed from the basis that it was important for him to identify all the parties' property.

[82] He advised Mr XR what information he required from him.

[83] Attempts to progress the file hit an obstacle when, over two months after first receiving instructions, Mr BQ was advised that Mr XR's former partner was seeking reimbursement for payments made to the mortgage. The amount of reimbursement claimed was not clarified until 28 March 2017.

[84] Mr BQ says that Mr XR had not informed him that he had made cash payments to his former partner until the issue of compensation for payment to the mortgage was raised.

[85] If that argument is advanced by Mr BQ to support contention that Mr XR had failed to give him clear instructions, and had provided him with insufficient information, I give no weight to that argument.

[86] Mr XR's position from the outset, was that he was prepared to settle on the basis of the arrangements recorded in the s 21 agreement.

[87] He was prepared to settle on the basis of the property being divided in accordance with the formula for division set out in the s 21 agreement and with the parties retaining as their separate property, the property that had been identified as such in the agreement. It was understandable that Mr XR would not see the need to raise the issue of the cash advances.

[88] Nor is it surprising that Mr XR would elect to raise the matter on being alerted to the fact that his former partner was seeking to be reimbursed.

[89] Mr BQ is critical of the fact that Mr XR provided him with an inflated estimate of the sum he recalled he had advanced to his former partner, and critical of the fact that Mr XR was unable to front up with evidence to support his claim.

[90] These arguments are part and parcel of the impression Mr BQ conveys of his client being somewhat unreliable, and that unreliability being a significant factor in contributing to the delay in bringing the matter to conclusion. Lack of clarity in the instructions provided was, says Mr BQ, compounded by Mr XR's refusal to accept advice that his interests would be better served if he was prepared to negotiate a settlement.

[91] Mr XR considered that Mr BQ's suggestion that Mr XR had been solely responsible for the escalation in the fee "verges on the absurd." He perceived Mr BQ's response to be an attempt on Mr BQ's part to evade responsibility for his poor decision-making.

[92] Mr BQ took instructions in December 2016 on the eve of the Christmas break. Apart from the first steps taken to garner information, the matter appears to have understandably, advanced little until early February 2017. The hiatus during January 2017 is no doubt explained by the Christmas/New Year shutdown.

[93] During the course of the retainer, Mr XR was on vacation overseas for a period of five weeks and uncontactable during that time.

[94] Mr XR terminated Mr BQ's retainer following receipt of Mr BQ's account in July 2017.

[95] Mr BQ argues that additional fees were incurred as a consequence of Mr XR's refusal to take his advice to settle.

[96] Mr BQ suggests that the circumstances of Mr XR's case were such that early settlement was the best option for him.

[97] Mr BQ says that Mr XR "[overrode] my advice to attempt to negotiate a settlement and achieve a quick resolution".[9]

[98] Further, he says that "[t]he only reason why such a short and relatively inexpensive process resulting in a Section 21A Property (Relationships) Act Agreement was not able to be achieved is because XR himself, and against my advice, effectively "dug his toes in" and would not concede that he had no real prospect of proving that the $45,000.00 contributions which [Ms X] alleged to have been made from her own funds in reduction of the mortgage principal sum were sourced at least partly by himself…".[10]

[99] In characterising Mr XR's position as obdurate, unreceptive to the taking of advice, and single-handedly responsible for fees being incurred that didn't need to be, Mr BQ does not, in my view, provide either a fair or accurate assessment of Mr XR's position.

[100] It is sound and prudent advice for a lawyer at commencement to counsel their client as to the benefits and advantages of attempting settlement.

[101] Avoiding having their client become ensnared in prolonged and bitter argument over division of relationship property is a laudable objective for any lawyer, but it is not an objective that is properly achieved by demand that their client accepts a position that the client is not happy with.

[102] Whilst Mr XR was firm in his view that he had advanced significant sums of money to his former partner, he was not unreceptive to compromising his claim.

[103] He made early concession to the fact that he was unable to produce evidence to establish that he had advanced funds to his former partner.

[104] Mr XR accepted that he would need to reimburse his partner some monies, but his argument was that his partner was claiming more than she was entitled to.

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[9] Mr BQ, correspondence to Complaints Service (28 November 2017) at p10
[10] Mr BQ, correspondence to Complaints Service (28 November 2017) at p9.

[105] On 7 May 2017, Mr XR advised Mr BQ that he would be prepared to offer his partner $25,000 to settle.

[106] On 17 May 2017, Mr XR indicated that he would stretch his offer to $30,000.

[107] Whilst adamant in his view that he had paid substantial sums to his former partner, albeit that he was unable to provide firm evidence of the payments made, Mr XR's preparedness to make concession is not reflective of a client who was obdurately committed to holding firm to a position in the face of robust advice from their lawyer that the position was untenable.

[108] Whilst it is reasonable for Mr BQ to argue that costs increased because agreement could not be reached, to frame that argument in terms that imply that Mr XR was the author of his own misfortune is unfortunate.

[109] Taken to its extreme, Mr BQ's argument would reduce to the untenable proposition that Mr XR was required to follow Mr BQ's advice to attempt settlement at the earliest possible opportunity, and any failure to do so rendered Mr XR responsible for incurring further costs.

[110] Whilst it approaches the trite to observe that costs will increase the longer a matter remains unresolved, Mr BQ's criticism of Mr XR that he was resistant to accepting sound advice is not convincing.

[111] There is no indication of Mr BQ providing robust advice to Mr XR at any stage, that Mr XR's positions were untenable, and that it would be counter-productive and expensive for Mr XR to continue.

[112] Mr BQ, from commencement, was proceeding on the basis that a comprehensive s 21A agreement needed to be drafted to protect Mr XR's position.

[113] Mr BQ appeared to have formed a firm view by 8 March 2017 that Mr XR would be wise to accept the s 21A agreement, writing to Mr XR on that day advising that: " [i]n simple terms, you and I cannot afford to argue against what has been recorded in that relationship property agreement as by doing so – at the very least – you would open up a "can of worms" and allow [Ms X] and / or her lawyer to argue that the agreement should be set aside".[11]

[11] Mr BQ, correspondence to Mr XR (8 March 2017).

[114] But in that same correspondence, Mr BQ advised Mr XR of the possibility that he (Mr XR) did have an argument that his "contributions towards renovating, and increasing the value of the [address] remain your separate property…".[12]

[115] Mr BQ concludes that correspondence with strong recommendation that attempts be made to negotiate a comprehensive settlement.

[116] This correspondence was forwarded prior to receipt of the compensation demand.

[117] On 5 April 2017, (when Mr XR was absent from the country) Mr BQ wrote to Mr XR advising that "[w]e have an argument that you may be entitled to more than what we previously discussed".

[118] What follows is argument that Mr XR's equity in the property would be enhanced, if the balance owed on the mortgage was deducted from the sum calculated to be divided between the parties in accordance with the formula recorded in the s 21 agreement.

[119] Mr BQ notes that having perused the s 21 agreement, he had concluded that there was possibility of Mr XR advancing a further argument that he was entitled to be reimbursed for payments made to the mortgage, if it could be established that those payments had been made from his separate property.

[120] This was argument, raised by Mr BQ, that Mr XR had prospect of advancing two arguments which, if successful, could result in a more favourable outcome for him.

[121] Mr BQ caveated his advice with caution to Mr XR that he ran the risk, if he elected to proceed, of aggravating his former partner and possibly prompting her to reject any settlement offers.

[122] Having identified two possible approaches and having cautioned Mr XR that pursuing either could jeopardise his ability to settle, Mr BQ advises Mr XR that "the decision is yours".

[123] On 10 May 2017, Mr BQ forwarded a settlement proposal to Mr XR's partner's lawyer.

[124] Her lawyer responded to advise that he'd had difficulty understanding Mr BQ's figures.

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[12] Mr BQ, correspondence to Mr XR (8 March 2017).

[125] On 17 May 2017, Mr BQ wrote to Mr XR advising that he had "considered in more detail" the structure of the prenuptial agreement, and having done so, had concluded that "we will not be successful in negotiating or persuading the court that you should obtain any additional benefit for the amount by which you have reduced that $200,000.00 loan during the course of the relationship".

[126] This advice presented in contrast to Mr BQ's earlier indication in his correspondence of 5 April 2017 that arguments could be advanced that Mr XR was entitled to receive a greater share of the equity in the property.

[127] Mr XR responded to this indication by informing Mr BQ that he "understood the plan you had for the additional benefit hasn't proven to be a valid one and so that will fall off the list. I'm disappointed that we have taken a detour that seemed to be fruitless".

[128] It is clear that Mr BQ had, over a period of time, formed different views as to how Mr XR's share in the property was to be calculated.

[129] This is not to be critical of Mr BQ – a lawyer's view on the issues raised by a particular case may evolve as the case progresses – but rather to reinforce that this was not a case where Mr XR had been given clear and unequivocal advice at commencement to settle and had refused to do so.

[130] Having received indication that Mr BQ had, in April, formed a view that Mr XR had possibility of pursuing two arguments which may have resulted in him receiving a greater share in the property, it was understandable that Mr XR would have been encouraged to explore the possibility of advancing those arguments.

[131] Nevertheless, having on 17 May 2017 closed the door on possibility of challenging the formula for determining the parties' respective interest in the property, Mr BQ kept open the possibility of Mr XR seeking reimbursement for costs incurred in renovating the property.

[132] When the question as to whether Mr XR could successfully mount a claim to recover renovation costs became the focus, Mr XR advised Mr BQ that he had verbally raised the possibility of reimbursement for costs of renovation with Mr BQ some time earlier, but had assumed that renovation costs were recovered by the increase in the value of the property.

[133] Mr XR made request of Mr BQ to confirm as to whether he was entitled to recover his renovation costs, noting that he presumed that "these things are all laid down in the law and not up for debate".[13]

[134] Mr BQ responded to Mr XR confirming that he did have an argument to recover some of his renovation costs, if he was able to establish that those costs had been funded from Mr XR's separate property.

[135] Mr BQ repeats his caution that it would be prudent for Mr XR to negotiate a compromise rather than to risk litigation.

[136] On 29 May 2017, Mr BQ wrote to Mr XR recommending that he negotiate a settlement on the basis that his former partner's interest in the property be calculated at $194,000.00, and that Mr XR offer a sum (in an amount to be determined by Mr XR) to meet contributions made by Mr XR's former partner in reduction of the mortgage.

[137] Mr XR observes that the figure advanced as representing his partner's share in the property, was identical to what he had calculated her entitlement to be when first instructing Mr BQ.

[138] On 30 May 2017, Mr XR sought further clarification from Mr BQ as to whether it would be worthwhile for him to pursue the renovation argument, noting that before he spent more time on assembling his invoices, he wished to ascertain whether the renovation claim presented as a "realistic goal".

[139] Mr BQ responded "you certainly do have a strong argument (and claim) to recover some of the costs that you can prove you have spent on renovations or upgrading [Address] [Town]– if sourced from Mr XR [AB] Ltd".[14]

[140] Mr XR set about assembling his invoices.

[141] On 9 June 2017, Mr BQ forwarded a settlement proposal to Mr XR's former partner's lawyer.

[142] That proposal confirmed that Mr XR accepted his former partner's argument that the parties' respective shares in the property be quantified on the basis of the formula that was detailed in the s 21 agreement and advised that Mr XR was prepared to offer $20,000 to compensate his former partner for payments made by her to the reduction of the mortgage.

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[13] Mr XR, correspondence to Mr BQ (17 May 2017).
[14] Mr BQ, correspondence to Mr XR (9 June 2017).

[143] On 12 June 2017, Mr BQ advised Mr XR to include in his reimbursement claim, a portion of the payments he had made to the rates on the property.

[144] Mr XR responded that he would like to be reimbursed for the costs discussed "if the law says that I can".

[145] Mr XR provided Mr BQ with a substantial number of invoices.

[146] Mr BQ spent some time checking the invoices and identifying areas where further clarification was required. Some of the changes needed were minor.

[147] Mr BQ identified a number of invoices which he had not received from Mr XR.

[148] On 25 July 2017, Mr BQ advised that he would be on leave for a month. He rendered his second invoice to Mr XR.

[149] That appears to have prompted Mr XR to engage fresh counsel.

[150] I have set out the exchanges between the parties in comprehensive form, to illustrate and reinforce that a careful analysis of the file does not support Mr BQ's fundamental argument, that he was frustrated in his attempt to achieve settlement by Mr XR obstinately refusing to take Mr BQ's advice to settle, and that costs escalated because of this.

[151] Mr BQ's advice to compromise and settle are not presented from a context of him advancing argument that Mr XR had no realistic opportunity to negotiate a settlement with his partner, or advance claims that would mitigate his losses.

[152] To the contrary, Mr BQ was, for some time, uncertain as to what influence the s 21 agreement had on opportunity for Mr XR to advance arguments under the Property (Relationships) Act.

[153] Further, Mr BQ was introducing potential arguments for Mr XR to advance, and suggesting various approaches to interpreting and applying the formula for division set out in the s 21 agreement.

[154] When Mr XR accepted that he had little prospect of proving that he had advanced substantial sums to his partner, Mr BQ assured him that he had reasonable grounds to advance a claim for reimbursement of renovation costs.

[155] Whilst Mr BQ had difficulty reconciling some of the invoices provided, the problem is not identified as being of such significance to have potential for irreparably compromising Mr XR's potential claim.

[156] The renovation claim was not advanced. It may or may not have succeeded. Mr XR may or may not have been able to produce sufficient evidence to support the claim. The retainer terminated at the point when the evidence was still being assembled.

[157] But Mr XR understandably sought assurances from Mr BQ that his claim had prospects of success. He sought that assurance before he embarked on the time-consuming process of assembling invoices.

[158] Mr BQ's suggestion that Mr XR incurred additional and unnecessary cost as a consequence of his "own actions and instructions", and argument that Mr XR's evidence did not measure up, is argument that diminishes the role Mr BQ played in advancing the case down various paths.

[159] Mr BQ's job was to advise Mr XR. But in providing defence to argument that his fees were excessive by portraying Mr XR as a somewhat recalcitrant client who refused to accept Mr BQ's sound advice to settle, is to mischaracterise the retainer.

[160] Finally, when considering argument that Mr XR was resistant to offers to settle, Mr BQ's repeated cautions about the desirability of attempting to negotiate and settle were almost invariably accompanied by advice to Mr XR as to how he could improve his position, and advice as to the options available for calculating a final settlement figure.

[161] This does not detract from the obvious. Negotiating settlement of property following a separation can be difficult. Mr BQ cannot be criticised for explaining options that had possibility of providing better return for his client. Inevitably that work would result in further time being spent, and further costs.

[162] But it was not the case that an obdurate refusal to follow advice was the cause of fees being incurred which Mr BQ himself acknowledges, were higher than would have been expected.

Were the fees charged fair and reasonable?

[163] Mr BQ's fees totalled $12,665 including GST.

[164] He describes the fees charged as concessionary.

[165] By this, he means that he charged less than time spent on the file.

[166] Mr XR raised a number of objections to the fee but pivotal was his concern that Mr BQ had spent unnecessary time on drafting and amending the s 21 agreement.

[167] The Committee's determination that there had been unsatisfactory conduct on Mr BQ's part, followed its conclusion that Mr BQ had spent an unnecessary amount of time on drafting and making frequent amendments to the agreement. It recorded that it had "difficulty with the concept of a client simply being billed for drafting all the numerous amendments to an agreement, particularly when as Mr BQ himself noted that Mr XR seemed to "want to dig in for a fight", which suggested that settlement was not imminent".[15] Further, the Committee noted that whilst it was "concerned with the pre-emptive drafting of the agreement it was more concerned about the billing of Mr XR for the continual updating/amending of it."[16]

[168] It was the Committee's view that work on preparing a relationship property agreement would more usually proceed when the parties had finalised the terms of the settlement.

[169] Having, as I have done, carefully examined the Standards Committee file, and having scrutinised the steps taken and decisions made by Mr BQ when progressing Mr XR's case, I find myself in agreement with the Committee that the question as to whether the fee charged presents as fair and reasonable, focuses sharply on the question as to whether time spent by Mr BQ on drafting and amending the agreement was unproductive, thereby incurring costs to Mr XR that were unnecessary.

[170] Mr BQ, in defending his fee, argues that the fee charged accurately reflected the time spent on the file.

[171] He submits that preparing a draft agreement before all matters had been settled was prudent, and an exercise that would ultimately have saved his client time.

[172] I take it from this that Mr BQ is suggesting that he was, as the matter progressed, drafting an agreement which would ultimately record the final settlement reached, and which would, when finality in negotiations had been reached, require only minor amendment to achieve completion.

[173] Mr XR points to Mr BQ's time records, and identifies more than 20 occasions that Mr BQ records time as having been spent on drafting and amending the agreement.

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[15] Standards Committee decision (17 August 2018) at [12].
[16] Standard Committee decision at [16].

[174] Mr BQ argues that the entries in his time records which recorded time spent on amending the agreement would also have referenced other work that was done. In defending his fee, argues that the fee charged accurately reflected time spent on the file.

[175] Referring to the relevant authorities, this Office has observed that considerations to be taken into account when determining whether a fee is fair and reasonable include:[17]

> (a) Setting a fair and reasonable fee requires a global approach;
>
> (b) What is a reasonable fee may differ between lawyers, but the difference should be "narrow" in most cases;
>
> (c) While time spent must always be taken into account it is not the only factor;
>
> (d) It is not appropriate to (as an invariable rule) multiply the figure representing the expense of recorded time spent on the transaction by another figure to reflect other factors.

[176] The High Court has held that it is:[18]

> … the obligation, which is clear from a number of authorities, for a practitioner who is using time and attendance records to construct a bill, to take a step back and look at the fee in the round having regard to the importance of the matter to the client, in some cases the client's means, the value to the client of the amount of work done, and proportionality between the fee and the interim or final result of the legal work being carried out.

[177] Because the process of determining a fair and reasonable fee is "an exercise in balanced judgment, not an arithmetical calculation":[19]

> … different people may reach different conclusions as to what sum is fair and reasonable, although all should fall within a bracket which, in the vast majority of cases, will be narrow.

[178] For that reason, this Office has referred to there being a "proper reluctance to "tinker" with bills by adjusting them by small amounts," and that it "is therefore appropriate for Standards Committees not to be unduly timid when considering what a fair and reasonable fee is." [20]

[179] Also, that "[w]here there is a complaint about a bill of costs there is no presumption or onus either way as to whether the fee was fair and reasonable."[21]

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[17] *Hunstanton v Cambourne* LCRO 167/2009 (10 February 2010) at [22].
[18] *Chean v Kensington Swan* HC Auckland CIV 2006-404-1047, 7 June 2006 at [23].
[19] *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 at 441.
[20] *Hunstanton v Cambourne*, above n 17 at [62].
[21] At [63].

[180] Rule 9.1 specifies "[t]he factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include …". Thirteen factors are contained in paragraphs (a) to (m) of that rule. It is important to note that this list of factors is not exhaustive. Other factors may apply, on a case by case basis.

[181] Overarching r 9.1, is the requirement (in r 9) for fees charged to be both fair and reasonable for the services provided having regard to the interests of both lawyer and client, as well as the factors set out in r 9.1.

[182] Whilst I accept that it was reasonable for Mr BQ to have spent time preparing the foundation for a s 21A agreement, I have difficulty with Mr BQ's argument that the process of constantly amending the agreement served a productive purpose for his client and would ultimately have saved time.

[183] Mr BQ's time records evidence a total of 22 entries where reference is made to either drafting or amending the agreement.

[184] Mr BQ is correct when he notes that a number of the entries in which reference is made to work spent on the agreement, also referred to other work that was done.

[185] The total time invoiced for work recorded in notations which reference work spent on the agreement is approximately $5,091.58.

[186] Time recorded spent as relating solely to the agreement, or which appear to incorporate minimal peripheral work, reflect a fee charged of around $1,275.

[187] A number of the notations which reference work done on the agreement, referred to the additional work completed under the general heading of research (for example research and amending draft agreement).

[188] A feature of the time records is the frequency that Mr BQ turns his attention to amending the agreement.

[189] The records reflect an almost continuous attention to research, drafting or amending.

[190] Examining Mr BQ's time records from a broader perspective, the records are replete with reference to work spent by him on researching issues arising from the initial property agreement and evaluating options for settlement in light of the instructions provided by Mr XR.

[191] Mr BQ's first account in the sum of $2,880 (inclusive of GST and disbursements) gives indication of substantial time having been spent by him on researching the issues.

[192] His second account is dominated by references to work completed on preparing the agreement.

[193] Of the 19 notations recording work completed from 5 April 2017 to 24 May 2017, nine refer to work spent on the agreement.

[194] Critical to the issue as to whether work charged for drafting and amending the agreement was both fair and reasonable, and whether the work completed served the interests of both client and lawyer, is the question as to whether the work done was both necessary and productive for Mr BQ's client.

[195] It is my view that a significant amount of the work was neither productive nor necessary.

[196] Whilst as I have noted, I do not consider that Mr BQ can be fairly criticised for making the decision at commencement that a settlement should be recorded in a s 21A agreement (an approach which Mr XR's subsequent lawyer is said to have considered unnecessary) having prepared a framework for the agreement in early April 2017, it is difficult to see how Mr XR's interests were best served by a process of continually amending the agreement when it is compellingly apparent that at no stage was Mr BQ in a position to record settlement of the substantive issues.

[197] Mr XR was charged a total fee (inclusive of GST and disbursements) of $12,665.

[198] Bluntly put, at the point when he elected to terminate the retainer, little had been achieved.

[199] That is not to be critical of Mr BQ as the process of negotiating a settlement of relationship property issues can be cumbersome and protracted. In this case, Mr XR's commitment to negotiating a settlement which allowed some consideration for the funds he maintained he had paid to his former partner was, as Mr BQ fairly observes, significant in shaping the progress of the file.

[200] But it is clear that Mr BQ was drafting and amending an agreement and submitting this to Mr XR for his consideration in circumstances where the parties were not remotely close to reaching agreement, and there were issues awaiting resolution which would have significant impact on the shape of the final agreement.

[201] Mr BQ sent the first agreement to Mr XR on 19 May 2017. He describes the agreement as “still very much a work-in-progress”. He notes that he requires further input from Mr XR. He notes that he requires further instructions.

[202] In the correspondence attaching the agreement, Mr BQ provides his opinion on the issue as to whether Mr XR would have prospect of recovering his renovation costs. He also notes that the question as to what amount would be payable to his former partner was “still negotiable”.

[203] Whilst Mr BQ was, on 19 May 2017, presenting Mr XR with a draft agreement in circumstances where all the major issues arising from the separation remained unresolved, his first draft had been prepared as early as 5 May 2017 and had undergone no fewer than six updates between 5 May 2017 and 19 May 2017.

[204] The second draft agreement was forwarded to Mr XR on 29 May 2019.

[205] Little progress had been made in advancing matters between 19 May and 29 May.

[206] Mr BQ’s correspondence of 29 May 2017 gives every indication, as did his correspondence of 19 May, that the parties were not remotely close to reaching an agreement.

[207] Surprisingly, Mr BQ suggests in this correspondence, that he would, subject to Mr XR checking the agreement, forward the agreement to his former partner’s lawyer with expectation that this would “hopefully wind matters up without too much further work required or delay”, this despite the fact that no progress had been made in resolving the issues of most significance for Mr XR.

[208] The third and final draft was forwarded to Mr XR on 9 June 2017.

[209] By this point, Mr BQ had arrived at firm conclusion that Mr XR’s share in the property would be determined by reference to the s 21 agreement, and that Mr XR’s payments towards the mortgage were, under the terms of the agreement by which he was bound, to be treated as capital payments.

[210] On the same day that Mr BQ forwarded the agreement to Mr XR, he despatched further correspondence enclosing copies of sections of the Property (Relationships) Act 1976.

[211] Mr XR was invited to read the sections as Mr BQ considered that they "are or may be relevant to your circumstances, and in the main are referred to in the draft Relationship Property Agreement which I have already mailed to you.

[212] In what can only be regarded as a somewhat nonchalant approach to the providing of legal advice, Mr XR is recommended to read the sections provided, Mr BQ noting that "if you can be bothered doing so, and I suggest that it is well worth your while, you should print out the sections, and read the same, attempting to understand the same".

[213] When forwarding the third agreement to Mr XR on 9 June 2017, Mr BQ also provided Mr XR with a copy of correspondence he intended to forward to his former partner's lawyer. Mr BQ in that correspondence, signalled that he would shortly be in a position to provide a s 21A agreement but noted that he had just received a significant amount of documentation from Mr XR.

[214] The documentation related to the proposed claim for reimbursement of renovation costs, a claim which had been estimated could be in the vicinity of around $70,000.

[215] It is clear that Mr BQ was engaged in a continuous process of changing and amending the relationship property agreement, in circumstances where there was not, at any point, a finalised agreement on the settlement terms.

[216] I agree with the Committee, that work on drafting and editing a relationship property agreement is commonly done once the parameters of the agreement have been concluded.

[217] I see little value for Mr XR in an agreement being repeatedly amended in circumstances where the terms of the final settlement remain unclear.

[218] Argument that this attentive approach saved money in the long run is not persuasive.

[219] In approaching the management of Mr XR's case in the manner he did, Mr BQ, in my view, paid insufficient heed to his obligation to ensure that the fee charged was fair and reasonable, having regard to the interests of his client.

[220] Of the fee factors engaged by r 9.1, those I consider to be of particular significance are r 9.1(a) and r 9.1(c).

[221] For the reasons explained, I do not consider that Mr XR received value for time and labour expended, nor do I conclude that the results achieved through the process of drafting and amending the agreement, was work which had value for the fee charged.

[222] The Committee's determination that there has been unsatisfactory conduct on the part of Mr BQ is confirmed.

[223] The Committee recorded its unsatisfactory conduct finding by reference to conclusion that Mr BQ's frequent editing and amending of the s 21A agreement fell short of the standard of competence that would be expected of a reasonably competent lawyer practising in the relationship property field.

[224] Whilst not specifically referenced by the Committee, I assume that it was its intention to support its finding by reference to s 12(a) of the Act.[22]

[225] A finding of unsatisfactory conduct is further supported, in my view, by a determination that Mr BQ's failure to charge a fee that had sufficient regard to the interests of his client, breached r 9 (not fair and reasonable) such as to establish unsatisfactory conduct under s 12(c) of the Act.

[226] Having confirmed the Committee's unsatisfactory conduct finding, attention turns to the penalties imposed.

[227] Whilst I am reluctant to "tinker" with the decision to reduce Mr BQ's fee, the Committee's decision gives no indication as to how it arrived at its conclusion that a fee reduction in the sum of $4,000 was appropriate.

[228] Fee assessment is not an exact science. Rules 9 and 9.1 endeavour to introduce rigour to the process but even that will inevitably give rise to disagreement about what is fair and reasonable in any given situation.

[229] I have had opportunity to carefully review the file, scrutinise the time records, and consider further submissions for the parties.

[230] Having done so, I conclude that the reduction directed by the Committee is excessive.

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[22] Which defines unsatisfactory conduct as 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.

[231] I reach that view following:

(a) An assessment of the time spent by Mr BQ in working on the agreement.

(b) Cross referencing the time recorded on the agreement to the work that was included in the notations recording time spent on the agreement.

(c) A consideration of the time spent in the initial drafting of the agreement, time which would have had later value to Mr XR in the event the agreement was finalised.

[232] I consider a reduction of the fee in the sum of $3,000 is merited.

Costs

[233] Where a finding of unsatisfactory conduct is made or upheld against a practitioner on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case.

[234] Taking into account the Costs Guidelines of this Office, the practitioner is ordered to contribute the sum of $1,200 to the costs of the review, that sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

[235] The order for costs is made pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006

[236] Pursuant to s 215 of the Act, I confirm the costs order made in this decision may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

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

Decision

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

(2) The finding of unsatisfactory conduct is made pursuant to s 12(a) and s 12(c) of the Lawyers and Conveyancers Act 2006 and the Committee's decision is modified in this respect pursuant to s 211(1)(a).

(3) Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the Committee's decision to reduce Mr BQ's fee by $4,000 is modified and substituted with a finding that the fee is reduced by $3,000 (Lawyers and Conveyancers Act 2006, s 156(1)(e)).

(4) Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006, Mr BQ is ordered to pay $1,200 to the costs of this review, that sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

DATED this 29TH day of September 2020

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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:

Mr BQ as the Applicant
Mr XR as the Respondent
[Area] Standards Committee
New Zealand Law Society