LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 011

Ref: LCRO 181/2019

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Lawyers Standards Committee
BETWEEN	**SL** Applicant
AND	**GB** Respondent

DECISION

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

Introduction

[1] Ms SL has applied for a review of a decision by the [Area] Lawyers Standards Committee (the Committee) to take no further action in respect of her complaint concerning the conduct of Mr GB, a barrister sole, who, at the relevant time, acted for Ms SL, her sister Ms CS SL, and [F] Holdings Ltd ([FHL]), on a dispute with the vendors of a residential property purchased by [FHL].[1]

[2] Ms SL's application for review, her third from the Committee's decisions arising from her complaint about Mr GB's conduct, concerns allegations not addressed by the Committee in its first two decisions, but at my direction considered by the Committee in its third decision.

[1] [FHL] was Ms CS's company.

[3] In November 2014, Ms SL sold the property to the vendors. On or about 6 January 2015, the vendors sold the property to [FHL] for $455,000.

[4] Unable to agree with the vendors on a settlement date which was not specified in the sale agreement, on 12 June 2015 [FHL] lodged a caveat against the title to the property.[2] In early July 2015 the vendors applied to the High Court, first, to have the caveat removed,[3] and secondly, for an injunction restraining [FHL] from onselling the property.

[5] By then Mr DJ, of [Law Office 1] acted for [FHL]. On 10 July 2015, Mr DJ filed a Notice of Opposition to the vendors' proceedings, and engaged Mr GB to assist with [FHL]'s defence. Mr GB sent his letter of engagement to [FHL], Ms SL and Ms CS on 13 July 2015.[4]

[6] On 28 September 2015 Mr DJ served a settlement notice on the vendors' lawyer who responded on 6 October 2015 with the vendors' offer to sell the property to [FHL] for $509,000.

[7] Ms SL instructed (by email) Mr GB on 8 October 2015 to make a counteroffer of $469,000. The following day, 9 October 2015, Mr DJ informed the vendors' lawyer that [FHL] rejected the vendors' offer of $509,000 but would pay $455,000 as provided in the sale agreement.

[8] Having heard, on 28 October 2015, the vendors' application to remove [FHL]'s caveat, the High Court delivered its decision on 13 November 2015 in which it sustained the caveat.

[9] As detailed in my later analysis, between 15 January 2016 and 6 April 2016 Mr GB and Ms SL exchanged emails concerning (a) Mr GB's requests for payment of his fees, (b) his attempts to resolve the dispute by negotiation, (c) Ms SL's queries about his fees for the caveat hearing, the ongoing legal costs of the litigation, and how best to proceed; and (d) Ms SL's 8 October 2015 instructions to submit a counteroffer of $469,000.

[10] Mr GB informed (by email) Ms SL, and Ms CS on 7 March 2016 that to "achieve some cost savings" he may "engage a junior barrister to assist" with discovery. On 28 April 2016 he informed them he had engaged Ms PR.

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[2] [R&U], Lawyers acted for [FHL] at that stage. The caveat gave notice of [FHL]'s interest as purchaser.
[3] *[XXX] v [FHL] Holdings Ltd* [20xx] NZHC [xxxx]
[4] Not to Mr DJ who was Mr GB's instructing lawyer.

[11] On 3 May 2016 Ms SL asked (by email) Mr GB whether she could "approach" the vendors' lawyers "in an indirect way for an offer before the courts". The following day, 4 May, Mr GB informed (by email) the vendors' counsel he had been instructed to explore the "possibility of the parties settling this litigation".

[12] That approach was met without success. On 6 May Ms SL instructed Mr GB to submit a settlement offer of $485,000 which the vendors rejected at the case management conference on 11 May.[5]

[13] By Friday, 27 May 2016, Ms PR had completed and filed Ms SL's discovery affidavit. On 30 May Ms PR sent (by email) her first invoice, and report to Mr GB which he forwarded (by email) to Ms SL that day. Ms PR provided her second, 30 June 2016, invoice to Mr GB on 6 July 2016.

[14] From 8 July 2016 until 15 November 2016, the substantive hearing date, Mr GB, whilst continuing to act, unsuccessfully sought payment of his and Ms PR's fees, as well as a retainer to be lodged in Mr DJ's trust account for the hearing costs.

[15] The dispute was settled on 15 November 2016 before the hearing commenced.

[16] Despite further requests, on 28 February 2017, not having received "an acceptable proposal" for payment of his and Ms PR's fees, Mr GB informed (by email) Ms SL, Ms CS and Mr DJ he intended to seek leave to withdraw as counsel when the matter was next to be called in the High Court on [date], and recommended they seek other legal representation.

Complaint

[17] Ms SL lodged a complaint with the Lawyers Complaints Service on 28 February 2017.[6]

(1) Committee's decisions

[18] Ms SL's allegations, which included Mr GB's failure (a) to submit her 8 October 2015 counteroffer to the vendors' counsel, (b) to advise her about alternatives to litigation, and (c) to include a term in the settlement agreement, were considered by the Committee in one decision. Her complaint about Mr GB's fees was considered in a

[5] Ms SL, emails to Mr GB (6 May 2016); Mr GB, email to the vendors' counsel (9 May 2016).
[6] See also Ms SL, email to Lawyers Complaints Service (29 March 2017): Ms SL's other allegations are referred to below.

separate later decision. Ms SL applied for reviews of each decision which I considered in separate review decisions.

(2) Committee's fees decision

[19] The Committee decided Mr GB's fees were fair and reasonable, and determined to take no further action in respect of Ms SL's complaint about Mr GB's fees. I confirmed that decision in my review decision.[7]

(4) Further allegations not considered

[20] The Committee did not, in its fees decision, consider Ms SL's complaints that:

(a) Ms PR's fees were not fair and reasonable;

(b) without Ms SL's permission, Mr GB informed the vendors' lawyer her dispute with the vendors was not worth litigating;

(c) without first informing Ms SL, Mr GB informed the vendors' lawyer he was no longer acting for her; and

(d) Mr GB instructed a debt collector, a day before the date by which he had asked for payment of his and Ms PR's outstanding fees.

[21] For that reason, in my review of the Committee's fees decision, pursuant to s 209(1)(a) of the Lawyers and Conveyancers Act 2006 (the Act), I directed the Committee to reconsider and determine those issues.

Response

[22] I refer to Mr GB's response in my later analysis.[8]

Standards Committee decision

[23] The Committee delivered its decision on 23 October 2019, and determined, pursuant to s 138(2) of the Act, that any further action on Ms SL's complaint was unnecessary or inappropriate.

[24] The Committee noted that the issues for consideration were those I directed the Committee to reconsider in my review of the Committee's fees decision.[9]

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[7] Rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[8] Mr GB, email to Lawyers Complaints Service (21 August 2019).
[9] *AB v CD* LCRO 211/2018 (July 2019) at [162] and [163].

(1) Ms PR's fees

Fair and reasonable

[25] The Committee concluded Ms PR's fees were fair and reasonable, and because Ms SL's dispute with the vendors proceeded to a Court hearing, Ms SL was "liable" to meet the related legal fees.

[26] Although acknowledging it had not sought the assistance of an independent cost assessor, the Committee explained "a number of the members" of the Committee possessed "relevant expertise in civil litigation", including the discovery process which comprised the large part of the legal work carried out by Ms PR.

Fee factors

[27] In arriving at that conclusion, the Committee noted r 9 of Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) requires that in determining whether a lawyer's fee is "fair and reasonable for the services provided", regard must be had to "the interests of both client and lawyer", and "to the factors set out in rule 9.1".

[28] Those of the fee factors in r 9.1 considered particularly relevant by the Committee were (a) Ms PR's "time and labour expended: r 9.1(a); (b) Ms PR's "skill, specialised knowledge, and responsibility … to perform the services properly: r 9.1(b); "urgency" of the matter: r 9.1(d); and "the complexity of the matter": r 9.1(f).

(2) Settlement overtures – instructions

[29] The Committee concluded Ms SL had not "made out" Mr GB had not acted on her 3 May 2016 request whether there was "any way" she could "approach the [vendors'] lawyers in an indirect way for an offer before the courts".

[30] In reaching that decision, the Committee noted Mr GB had on 4 May 2016 forwarded to Ms SL his email sent to the vendors' counsel fifteen minutes earlier to explore "any possibility" of a settlement of the dispute, and Ms SL "had raised no issue with [the] content" of that email.

(3) Cease acting

[31] In deciding to take no further action on this allegation, the Committee noted Mr GB, faced with Ms SL "repeatedly breach[ing] undertakings and assurances" to pay

his and Ms PR's outstanding fees, and lodge a retainer with Mr DJ for the hearing costs, had nonetheless continued to act.

[32] The Committee concluded Mr GB had been "more than fair and accommodating" before giving notice on 28 February 2017 of his intention to withdraw as counsel.[10]

(4) Debt collection

[33] The Committee did not consider Mr GB, by seeking payment, had "behaved in a malicious way" towards Ms SL.

[34] Rather, (a) Mr GB's conduct "continuing to protect Ms SL's interests and preparing for trial" was "professional", and (b) Ms SL and Ms CS had attempted "to avoid paying" Mr GB's and Ms PR's "genuinely incurred invoices" which Ms SL did "not quer[y] at the time they were issued".

[35] In the Committee's view, Mr GB's instructions to a debt collector on 27 February 2017, having previously told Ms SL on 21 February he would not do so until 28 February, had to be viewed "in context". That is, since August 2016, Ms SL and Ms CS had "reneged on repeated undertakings" to pay Mr GB's and Ms PR's fees despite "ample time to make payment".

Application for review

[36] Ms SL filed an application for review on 4 December 2019. She says she disagrees with the Committee's decision, which shows bias. In her submission, the Committee gave Mr GB "the benefit of the doubt" which was "very unfair" to her.

[37] She says the Committee "brushed over the fundamental issues" concerning her complaint, namely, her 8 October 2015 instructions to Mr GB to present a counter offer of $469,000 which represented a reduction of the amount in dispute with the vendors "to just $40,000".

[10] See rr 4.2(c), 4.2.1(b), and 4.2.3: termination of a retainer by a lawyer for "good cause" includes where the client has not paid the lawyer "a fee on the agreed basis or, in the absence of an agreed basis, a reasonable fee at the appropriate time".

(1) Ms PR's fees

[38] Ms SL explains the "economics" of her dispute with the vendors was that "in all likelihood" the vendors "would have accepted" her counteroffer had Mr GB presented it as instructed.

[39] For that reason, she contends Ms PR's subsequent assistance in preparing for the hearing was "completely unnecessary" and asks why, in such circumstances, she ought to pay Ms PR's fees.

(2) Settlement overtures – instructions

[40] In Ms SL's submission, a lawyer should obtain the client's prior instructions, or "at least discuss" the matter before informing the opposing party, as Mr GB did on 4 May 2016, the dispute "is not worth litigating".

Ms SL says that statement by Mr GB suggested "doubt" to the vendors about the strength of her position. She disagrees such an approach is "a common litigation tactic".

(3) Cease acting

[41] In Ms SL's view Mr GB's conduct informing the opposing party of his intention to withdraw as counsel before informing her was malicious. She disagrees Mr GB had been "more than fair and accommodating" towards her concerning non- payment of his and Ms PR's fees.

(4) Debt collection

[42] Ms SL also considers Mr GB's conduct instructing the debt collector a day before his deadline for her to pay his and Ms PR's fees was malicious. She says the Committee did not explain why it decided not to take any further action on this aspect of her complaint.

Response

[43] In his response, Mr GB says he supports the Committee's decision, and relies on his submissions made in response to Ms SL's complaint.[11]

[11] Mr GB, email to LCRO (17 December 2019).

Review on the papers

[44] Mr GB agreed to the review being dealt with on the papers. Ms SL did not respond to the case manager's request for comment on the review being conducted on the papers. It follows that this review has therefore 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.

[45] 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

[46] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[12]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[47] More recently, the High Court has described a review by this Office in the following way:[13]

> 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

[12] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[13] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

> coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[48] 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 consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

Issues

[49] The issues I have identified for consideration in this review are:

(a) Were Ms PR's fees fair and reasonable?

(b) Did Ms SL's 3 May 2016 email request to Mr GB for his "suggest[ions] about her "approach[ing]" the vendors' lawyers "in an indirect way" require Mr GB to consult with Ms SL before he approached the vendors' counsel about the possibility of settlement of the dispute the following day, 4 May 2016?

(c) Did Mr GB inform the vendors' counsel, before he informed Ms SL and Ms CS, that because they had not paid his and Ms PR's fees he may seek the Court's leave to withdraw as their counsel? If so, did Mr GB contravene any professional obligations or duties?

(d) Did Mr GB refer recovery of his and Ms PR's fees for debt collection a day before the payment deadline of 28 February 2017 set by him in his 21 February 2017 email to Ms SL? If so, did Mr GB contravene any professional obligations or duties?

Analysis

(1) Ms PR's fees – issue (a)

(a) Mr GB's terms of engagement, engagement of Ms PR

[50] Mr GB's 13 July 2015 letter of engagement to [FHL], Ms SL and Ms CS, as required by the Rules, provided them with information on the principal aspects of client service and care including his, and his junior barrister's, hourly charge out rates.[14]

[14] See rr 3.4A, 3.5A, 3.6A, and 3.7 of the Rules.

[51] He described the legal services they required of him concerning the vendors' proceedings which sought (a) orders to remove [FHL]'s caveat, and (b) an injunction restraining [FHL] from selling the property, plus an order for general and special damages. He advised them "it may be necessary" to issue proceedings against the vendors seeking an order for specific performance.

[52] He stated "to keep costs to a minimum and/or to progress work within the timeframes required" he "may engage the services of a junior barrister".

[53] Relevant to his subsequent engagement of Ms PR in April 2016, he stated with "particularly complex, time-consuming or urgent work" he "may also engage a barrister either in addition to or other than [his] junior [barrister] to assist [him]". He said if that was "necessary" he would "discuss that with [them] and seek [their] agreement prior to doing so".

[54] On 7 March 2016, Mr GB informed (by email) Ms SL and Ms CS he "need[ed] to prepare an affidavit of documents", required by the end of that week, comprising "around 10 hours work", and he "may be able to achieve some cost savings" if he "engaged a junior barrister to assist" him with "some of the preparation work (under [his] supervision)".

[55] As will be noted in my later consideration of Ms SL's complaint about Mr GB's notice to Ms SL on 28 February 2017 of his intention to withdraw as counsel, Ms SL's emails to Mr GB during March and April 2016 about payment of Mr GB's fees contained no response to his intention to engage Ms PR.

[56] On 28 April 2016, Mr GB informed Ms SL and Ms CS he had "engaged the services of [Ms] PR to assist [him] complete the discovery" which would include drafting "an affidavit of [relevant] documents" for Ms SL to sign.[15]

[57] He said Ms PR would require "other documents" including (a) Ms SL's previous lawyer's purchase file for which he provided an authority to uplift, (b) "a copy of [Mr DJ's] file" which he said he would obtain, and (c) the sale file to the vendors. He asked Ms SL to "call" or "reply to [his] email" with "any questions" she may have.

[58] Upon receipt of Ms PR's first, 30 May 2016, invoice from Mr GB that day, the next day, 31 May, Ms SL informed (by email) him "we will pay [Ms PR]".

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[15] Mr GB did not include a note of Ms PR's hourly charge out rate, which was not made known to Ms SL until she received Ms PR's 30 May 2016 invoice from Mr GB.

(b) Committee's decision

[59] Ms PR's two invoices issued to Mr GB which he passed on to Ms SL for payment were not considered by the Committee in its fees decision. The Committee noted in that decision that while the cost assessor had mentioned the invoices, Ms PR had not been asked for her comment. The Committee stated it "treated" the invoices "as disbursements" to Mr GB's invoices.

[60] It was for those reasons I directed the Committee to reconsider and determine Ms SL's complaint insofar as it related to Ms PR's fees.

[61] In his submissions to the Committee concerning Ms PR's fees, on which he says he relies for the purposes of this review, Mr GB says he takes ultimate responsibility for her fees. For that reason, and because nearly four years have elapsed since Ms SL made her complaint to the Law Society about Mr GB, it is in the parties' interests that the complaint be finally determined. [16]

(c) Discussion

Parties' positions

[62] Ms SL claims Ms PR's attendances, and fees in preparing for the substantive hearing were "completely unnecessary". She says had Mr GB, as she instructed him on 8 October 2015, presented her counteroffer of $469,000, the vendors would "in all likelihood" have "accepted" it. In such circumstances she asks why she ought to pay Ms PR's fees.

[63] As noted above, Mr GB says he is ultimately responsible for payment of Ms PR's fees which, in his submission, are fair and reasonable.

Fair and reasonable fee – professional rules

[64] Rule 9 prohibits a lawyer from charging a client a fee that is more than fair and reasonable for the legal services provided by the lawyer:

> A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.

[16] Section 200 of the Act.

[65] Considerations to be taken into account when determining whether a fee is fair and reasonable include:[17]

> (a) … a global approach;
>
> (b) what is a reasonable fee may differ between lawyers, but the difference should be "narrow" in most cases;
>
> (c) ... time spent … 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.

[66] The process of determining a fair and reasonable fee is "an exercise in balanced judgment - not an arithmetical calculation".[18] As noted above, one lawyer may reach a "different conclusion" from another lawyer "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".[19]

[67] There is "no presumption or onus either way as to whether the fee was fair and reasonable."[20] A particular lawyer's approach to billing may not necessarily "be a relevant consideration in determining whether a fee is fair and reasonable in all of the circumstances".[21] It is only when a fair and reasonable fee has been determined "can it be assessed whether the fee charged is sufficiently close to that amount to properly remain unchanged".[22]

Ms PR's 30 May 2016 invoice

[68] Ms PR's first invoice, dated 30 May 2016, for the period 29 April 2016 to 30 May 2016, concerned her attendances on discovery. In my view, of the fee factors in r 9.1 which a lawyer must take into account when determining a fee, I consider the following factors particularly relevant when considering Ms PR's fee.

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[17] *Hunstanton v Cambourne* LCRO 167/2009 (February 2010) at [22] referring to *Property and Reversionary Investment Corp Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 (QB) at 441–442, and *Gallagher v Dobson* [1993] 3 NZLR 611 (HC) at 620 per. See also *Chean & Luvit Foods International Limited v Kensington Swan* HC Auckland CIV 2006-404-1047, 7 June 2006 at [24], referred to in *AA v BK* LCRO 264/2012 (July 2013) at [57].
[18] *Property and Reversionary Investment Corp Ltd*.
[19] *Hunstanton v Cambourne* at [62].
[20] At [62].
[21] At [15].
[22] At [64].

Time and labour expended – r 9.1(a)

(a) Ms PR's fee of $7,560 plus GST, according to my calculations, incorporated a reduction of $904.40 from her total time recorded of 30.23 hours which at her hourly charge out rate of $280 would otherwise have resulted in a fee $8,464.40 plus GST.

Mr GB says Ms PR's hourly charge out rate of $280 represented a reduction from her usual rate of $320.

Skill, specialised knowledge and responsibility; experience, reputation – rr 9.1(b) and 9.1(g)

(b) At the time Mr GB engaged her to assist him, Ms PR, also a barrister sole, had approximately nine years post admission experience.

Importance of the matter to Ms SL, and the results achieved; urgency – rr 9.1(c) and 9.1(d)

(c) The completion of discovery, important to [FHL], Ms SL, and Ms CS in the context of the vendors' proceedings, was completed by Ms PR by Friday, 27 May 2016, within a month of being instructed by Mr GB.

(d) With the case management conference scheduled for 11 May 2016, and timetabling of progress of the vendors' proceedings yet to be determined, although Mr GB might possibly have begun the discovery process earlier than he did, as indicated in his 7 March 2016 email to Ms SL, in my view that ought not reflect on Ms PR who completed the discovery process in a timely manner.

Fee customarily charged in the market – r 9.1(m)

(e) Ms PR's hourly charge out rate of $280 plus GST compares favourably when placed alongside the average hourly charge out rates of employed lawyers with nine years experience published in a Law Society survey.[23]

Ms PR's 30 June 2016 invoice

[69] Ms PR's second invoice, dated 6 July 2016 for the period 30 May 2016 to 28 June 2016, largely concerned her work reviewing the application to strike out a

[23] Geoff Adlam "Charge-out rates information released" (2016) 893 LawTalk 36: the average was "$339.49", with the range as "$250 – $500".

counterclaim; drafting and filing the memorandum, and affidavit in response; reviewing the amended statement of claim; preparing a chronology, reviewing Ms SL's former lawyers' file, and arranging supplementary discovery.

Time and labour expended – r 9.1(a)

(a) Ms PR's fee of $3,360 plus GST represented 12.18 hours work at the same hourly charge out rate of $280 thereby incorporating a small allowance, or reduction.

Other factors

(b) My observations concerning the other fee factors referred to above similarly apply to this invoice.

Conclusion

[70] Overall, it is my view, as found by the Committee, Ms PR's fees for her attendances were fair and reasonable.

[71] In reaching that decision, I take no account of Ms SL's contention Ms PR's fees were unnecessary due to [Ms SL's] claim Mr GB did not submit [Ms SL's] 8 October 2015 counteroffer to the vendors' counsel. This is because, as I concluded in my review of the Committee's litigation decision, Ms SL was unable to prove, on the balance of probabilities, Mr GB did not respond to her that day.[24]

(2) Settlement overtures – instructions – issue (b)

[72] Ms SL alleged Mr GB did not, in effect, consult with her following her 3 May 2016 request to him for advice about the possibility of her and Ms CS approaching the vendors' lawyer direct to explore the possibility of settling the dispute.

(a) Context

[73] Ms SL's and Ms CS's third attempt to settle their dispute with the vendors, the subject matter of this aspect of Ms SL's complaint, began on 3 May 2016 with her request to Mr GB for his "suggest[ions]" about her and Ms CS's proposal to "approach" the vendors' lawyers direct.[25]

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[24] *AB v CD* LCRO 239/2017 (July 2019) at [76] and [92]. Ms SL explained to Mr GB in that email that legal costs incurred, and mortgage payments when added to the purchase price of $455,000 were almost equivalent to the vendors' offer of $509,000.

[25] Unless otherwise stated, all of the communications referred to are by email.

[74] Previous attempts at settlement had been made on 28 September 2015 when Mr DJ served a settlement notice on the vendors, and between 6 and 9 October 2015 when Ms SL instructed Mr GB to submit her counteroffer of $469,000 to the vendors.

[75] In her 3 May 2016 email to Mr GB, Ms SL asked him (a) whether there was "any way" she and Ms CS could "approach [the vendors'] lawyers in an indirect way for an offer before the courts", and (b) "what d[id] [Mr GB] suggest".

[76] The following day, 4 May at 12:43pm, Mr GB asked the vendors' counsel "if there is any possibility of the parties settling this litigation", and to "indicate" the vendors' views.

[77] He stated "the ongoing costs of the litigation [we]re making the acquisition of the property uneconomic" for [FHL], Ms SL, and Ms CS, and "some commercial pragmatism" was required. He suggested either (a) cancellation of the agreement and discontinuation of the proceedings with no issue as to costs whereupon [FHL] would withdraw its caveat; or (b) completion of the purchase at "an adjusted purchase price" to "reflect both parties' litigation risk" should the proceedings continue.

[78] Fifteen minutes later, at 12:58 pm, Mr GB forwarded that communication to Ms SL. At 5:50 pm he told Ms SL the vendors' counsel had asked him for a "specific [settlement] proposal" for consideration.

[79] In response the following day, 5 May, Ms SL said she would let Mr GB have "further details" after discussion with Ms CS. On Friday, 6 May, she instructed him to offer the vendors $485,000.

[80] On Monday, 9 May, Mr GB submitted that offer to the vendors' counsel who informed him, at the case management conference on 11 May, confirmed by email on 13 May, the offer was rejected.

(b) Discussion

Ms SL

[81] Ms SL claims Mr GB ought to have obtained her prior instructions, or "at least discuss[ed]" the matter with her before he informed the vendors' counsel on 4 May 2016 the dispute "is not worth litigating".

[82] As noted earlier, she says Mr GB's statement suggested to the vendors she had "doubt" about the strength of her position in the proceedings. She disagrees Mr GB's approach is "a common litigation tactic".

Mr GB

[83] Mr GB denies he acted without Ms SL's 3 May instructions. He says he regards Ms SL's 3 May email to him as her "express" instructions to enquire of the vendors' counsel about "the possibility of the parties settling" the litigation, and was "precisely" what she "asked [him] to do".

[84] In his view, the intention of Ms SL's instructions was to introduce "commercial pragmatism" into the dispute by "promot[ing] settlement discussions", and followed (a) his requests, since 15 January 2016, for payment of his fees, and (b) Ms SL's 6 April 2016 email "undertaking" to pay those fees on which he relied in "agree[ing] to continue to act".

[85] He says his comments, referred to above, in his 4 May email to the vendor's counsel are to be "read in [that] context". He says in response that day, the vendors' counsel asked (by telephone) him for a settlement proposal which he requested from Ms SL that day.

[86] He says Ms SL told him on 5 May she and Ms CS would discuss the matter, and on Friday, 6 May, instructed him to present their offer to purchase the property for $485,000. He says that offer, submitted to the vendors' counsel "in full and final settlement" on Monday, 9 May, was rejected on 11 May at the case management conference. He says he informed Ms SL on 13 May.

Instructions – professional rules

[87] With limited exceptions, a lawyer risks a complaint from a client with a prospect of a disciplinary response if the lawyer does not carry out the client's instructions.[26]

[88] However, where the lawyer is unsure about the client's instructions "it is incumbent on the lawyer to obtain clarification of those instructions. The lawyer may not proceed on an assumption the client agrees to a certain course of action".[27]

[89] A lawyer must disclose to his or her client information that is relevant to the retainer, take reasonable steps to ensure that the client understands the nature of the

[26] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [10.3].
[27] Webb, Dalziel and Cook at [10.3] – see r 1.6 as to the manner in which a lawyer must provide information to a client, and see the discussion in *Sandy v Kahn* LCRO 181/2009 (December 2009) at [38].

retainer, keep the client informed about progress, and consult the client about steps to be taken to implement the client's instructions.[28]

Conclusion

[90] I have carefully considered all of the material put before me concerning this aspect of Ms SL's complaint.

[91] Mr GB says he read Ms SL's 3 May email as her instructions to him to ask the vendors' counsel about the possibility of a settlement.

[92] However, in my view, the conclusion to be drawn from any reading of Ms SL's 3 May email is that Ms SL asked Mr GB to advise her whether it might assist to advance resolution of the dispute if she and Ms CS "approach[ed]" the vendors' lawyer before the proceedings were heard in Court. If so, for Mr GB to provide suggestions.

[93] Instead of providing Ms SL with the advice requested, on 4 May, Mr GB asked the vendors' counsel about the possibility of settling the dispute including putting forward settlement alternatives, referred to above, for consideration.

[94] No evidence has been produced that Mr GB, as requested by Ms SL, provided her with the advice she asked for, including any suggestions he may have about her and Ms CS's proposal that they approach the vendors' lawyer.

[95] In the absence of such evidence, I am satisfied, on the balance of probabilities, in contravention of r 7.1 Mr GB failed to advise Ms SL, as requested by her, of "the steps to be taken to implement" her 3 May instructions. However, as I later explain, I have decided not to make an adverse finding against Mr GB.

(3) Ceasing to act, fee recovery – issues (c), (d), (e)

[96] Ms SL claims it was malicious of Mr GB (a) to inform the vendors' counsel on 17 February 2017 he may withdraw as counsel for [FHL], Ms SL, and Ms CS, and on 28 February 2017 that he intended to withdraw, before he informed them, and (b) to refer recovery of his and Ms PR's fees for debt collection.

[28] Rules 7 and 7.1; at r 1.2, a "retainer" is defined as "an agreement under which a lawyer undertakes to provide or does provide legal services to a client …".

(a) Context

[97] Consistently over a period of thirteen months commencing January 2016, and except for Ms CS's payment of $3,713.06 on 3 October 2016, Mr GB's requests to Ms SL and Ms CS to pay his fees, and from July 2016 to pay Ms PR's fees went unheeded.

[98] Throughout that period, he expressed to them his reluctance to continue acting without being paid.

[99] On 1 March 2016 he informed them not making payment may "make it harder" for them to pay the costs incurred to date. He told them on 13 March it was "not good" for further legal costs to be incurred "while there are still substantial costs outstanding". He asked them on 22 March for payment of his fees owed to be "resolved urgently.[29]

[100] On 24 March Mr GB provided them with three payment options to consider over the Easter break. On 6 April, in response to Mr GB's 4 April question whether they still wanted him to act, Ms SL undertook to pay his fees, and asked him to continue.

[101] On 29 April Mr GB asked if they were still "on track to make the payment as promised". Ms SL assured him again on 3, 5, and 6 May, she and Ms CS would pay his fees, and upon receipt, on 30 May, from Mr GB of Ms PR's first invoice, the following day informed him they would pay Ms PR's fees.

[102] On 8 July Mr GB stated non-payment of his fees was "getting out of hand", and suggested they meet. On 3 August, when providing a summary of the fees owing, he again expressed his concern at non-payment. For him to continue acting he asked for payment of both his and Ms PR's fees, plus a retainer for the substantive hearing.

[103] He told Ms SL and Ms CS on 14 September that unless paid by Friday that week, 16 September, he could not proceed with preparation for the 15 November 2016 substantive hearing, and would have no option but to seek leave to withdraw as their counsel. He reiterated that for him to continue to act, payment of both the fees owed, and a retainer for the hearing costs was "critical at th[at] point in time". He followed up with Ms SL and Ms CS again about payment on 21 September, 25, 28 and 31 October.

[104] Ms SL provided Mr GB with further payment assurances on 29 July, 4 and 12 August (funds from the IRD); 19 September (bank loan); 21 September (client money owing); and on 26 and 28 October. Ms CS provided an assurance of payment on 1 November.

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[29] Unless otherwise stated, all of the communications referred to or by email.

[105] Despite not being paid, Mr GB continued to act, and negotiated a settlement of the dispute on 15 November 2016 prior to commencement of the hearing that day.

[106] Following settlement of the dispute he liaised with the vendors' counsel about the sale of the property. He again asked Ms SL and Ms CS about payment on 21 and 23 December, and on 12, and 25 January 2017.

[107] However, on 2 February 2017 when still not paid, he informed Ms SL, and Ms CS that "unless some payment [wa]s made immediately", he would "have no option" but to refer recovery for debt collection.

[108] Ms SL had informed him on 8 February 2017 that having taken independent legal advice she and Ms CS disputed his fees. A week later, on 17 February, Mr GB informed the vendors' counsel he was unsure if he would receive further instructions.

[109] On 21 February Mr GB informed Ms SL and Ms CS he required payment by 28 February otherwise he would place recovery of his and Ms PR's fees with a debt collector, and in the meantime had ceased work on her matter.

[110] On 28 February he received a letter from the vendors' counsel requesting a new trial date. At 1:07 pm Ms SL asked Mr GB to meet "as a final attempt to resolve issues".

[111] In response to the vendors' counsel at 7:28 pm, Mr GB said he "had been unable to obtain further instructions" and "intended to seek leave to withdraw".

[112] Six minutes later, at 7:34 pm, he forwarded the letter from the vendors' counsel to Ms SL, Ms CS and Mr DJ stating he would forward "a copy" of his reply to vendors' counsel.

[113] Two minutes later, at 7:36 pm, Mr GB forwarded them his 7:28 pm reply email to the vendors' counsel informing them he intended seeking leave to withdraw when the proceedings were called again in the High Court on 10 March 2017. He recommended they "arrange alternative representation" from that date.

[114] At 8:09 pm, "in a final attempt to resolve [Ms SL's] issues", he (a) provided them with details of the fees owed, (b) referred to Ms PR's offer to accept a reduced amount, (c) said he had continued to act despite not being paid, and (d) asked them what they "hope[d] to achieve" by the meeting Ms SL had requested.

[115] Ms SL made her complaint to the Law Society about Mr GB the following day, 1 March.

(b) Professional standards, rules – retainer

[116] In terms of the professional standards, and the Rules, the question is whether, on 28 February 2017, Mr GB had good cause to give notice of his intention to withdraw as counsel on the grounds [FHL], Ms SL, and Ms CS had not paid his, and Ms PR's fees.

Duty to complete

[117] Once a lawyer has been retained by a client the lawyer must, under r 4.2 of the Rules, "complete the regulated services required by the client under the retainer" unless any one or more of three exceptions specified in that rule apply.[30]

Exceptions

[118] The third exception, in r 4.2(c), permits a lawyer to terminate the retainer for "good cause and after giving reasonable notice to the client specifying the grounds for termination".[31]

[119] The grounds that constitute "good cause", listed "non-exhaustively" in r 4.2.1, "include", in r 4.2.1(b), "the inability or failure of the client to pay a fee on the agreed basis or, in the absence of an agreed basis, a reasonable fee at the appropriate time".[32]

[120] However, two preconditions, prescribed in r 4.2.3, must be met before the lawyer is permitted to either terminate a retainer,[33] or withdraw from proceedings[34] on the grounds that the client has "failed to make arrangements satisfactory to the lawyer for payment of the lawyer's costs".

[121] First, the lawyer must have "had due regard to his or her fiduciary duties" to his or her client, and secondly, have "given the client reasonable notice to enable the client to make alternative arrangements for representation".

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[30] By making this requirement, the rule expresses the doctrine of entire contract or the whole retainer principle: GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [3.185] and [3.190] and Webb, Dalziel and Cook, above n 27 at [5.8.1]. Section 6 of the Act defines "regulated services", and r 1.2 of the Rules defines "retainer": "retainer means an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made as a client or not".

[31] Rule 4.2: the other exceptions are: "(a) the lawyer is discharged from the engagement by the client; or (b) the lawyer and client agree that the lawyer is no longer to act for the client".

[32] The LCRO found this list was described "non-exhaustively" in *T v G* LCRO 29/2009 (April 2009) at [29]. Rule 4.2.2 provides that "none of the matters set out in rule 4.1.1" are "good cause to terminate a retainer".

[33] *T v G* LCRO 29/2009 (April 2009), above n 33.

[34] *Linton v Keswick* LCRO 95/2009 (August 2009).

Fiduciary duties

[122] Fiduciary duties form part of the special relationship between a lawyer and his or her client and include the duty of loyalty owed by the lawyer to the client which incorporates the duty to put the client's interests ahead of the interests of the lawyer.[35] For example, in the context of litigation, not to make an untimely withdrawal as the client's counsel.[36]

Reasonable notice

[123] As noted above, a lawyer who terminates a retainer for good cause under r 4.2(c) must first give the client "reasonable notice specifying the grounds for termination".

[124] If, under r 4.2.3(b), a lawyer, such as Mr GB, terminates the retainer on the grounds that the client has not paid the lawyer's fees, the lawyer must also give reasonable notice so the client can make alternative arrangements for representation, and under r 4.2.4, give "reasonable assistance to the client to find another lawyer".[37]

[125] In that regard, the observation has been made that "a diligent and competent lawyer would set out the reasons for the termination in writing and clearly inform the client what steps he or she ought to take to secure further professional assistance".[38]

[126] This could take the form of providing the client with the names of several lawyers known to the lawyer who, in the lawyer's reasonable opinion, had the necessary knowledge and skill in the area of law relating to the client's matter. With the client's prior permission, the lawyer might also introduce the client to another lawyer and explain the nature of the client's matter to the other lawyer.

(c) Discussion

Ms SL

[127] Ms SL claims it was not open to Mr GB to inform the vendors' counsel first, on 17 February 2017 he may withdraw as counsel, and secondly, on 28 February 2017 he

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[35] Dal Pont, above n 31 at [3.220]: "Where a client terminates a retainer for just cause, the prevailing ideal remains that the client in question must not be disadvantaged by reason of the termination".
[36] *Linton v Keswick* at [56]: "The retainer ... was terminated by [the lawyer] without notice …. ten days out from a hearing which was scheduled to run for three days", and on "the day before a scheduled chambers conference regarding the admissibility of certain evidence".
[37] Webb, Dalziel and Cook, above n 27 at [5.8.3]: Minimising prejudice to the client.
[38] *Sandy v Kahn* LCRO 181/2009 (December 2009) at [35].

intended to withdraw, before he informed her and Ms CS. Ms SL disagrees Mr GB was, as described by the Committee, "more than fair and accommodating" towards them concerning their non-payment of his and Ms PR's fees.

Mr GB

[128] Mr GB's position is that not having been paid he had "good cause" to withdraw as counsel. He says his requests, or "arrangements" for payment made by him "on multiple occasions" were met by Ms SL's and Ms CS's "numerous assurances and promises" to pay.

[129] He says even though, by April 2016, his fees had not been paid, he agreed to continue to act, yet by August 2016 they still owed him $20,668.79 for his legal work completed in 2015 and 2016, and owed Ms PR $12,558 for her legal work in May, and June 2016.

Duty to complete retainer

[130] Although Mr GB's 28 February 2017 notice to Ms SL and Ms CS of his intention to withdraw as counsel did not spell out why he wanted to withdraw, he had previously explained to them 5 and a half months earlier on 14 September 2016 that non-payment of his and Ms PR's fees could lead to his withdrawal.

[131] He had also signalled to them on 1 and 21 February 2017 that non-payment would result in referral of recovery of the fees owed for debt collection.

[132] For the same reasons, I do not consider the notice period of 10 days before the matter was to be called again by the High Court on 10 March 2017 was unreasonable.

[133] Taking into account the number of requests for payment made by Mr GB, apart from the payment he says Ms CS made on 3 October 2016, Ms SL and Ms CS did not make any other payments during the 13 month period commencing January 2016.

[134] Mr GB's 28 February 2017 notice of intention to withdraw as their counsel ought therefore have been no surprise to them.

[135] Concerning Mr GB's duty to provide reasonable assistance to Ms SL and Ms CS to find another lawyer, I observe that having received Mr GB's 28 February notice of intention to withdraw, the following day, 1 March, Ms SL told Mr GB she required him to keep acting until his withdrawal, and in the meantime was "in the process of appointing new counsel".

[136] I also make the observation that a postponed trial date requested by the vendors, if granted by the Court, may have reduced any potential for disadvantage to Ms SL and Ms CS in engaging replacement counsel.

Conclusion

[137] The High Court has stated that whilst the Rules are to be "applied as specifically as possible",[39] they "are also to be applied as sensibly and fairly as possible."[40]

[138] Following that approach, the conclusion I have reached from my consideration of the information produced is that viewed in the light of the communications between the parties I have referred to which led to Mr GB's 28 February 2017 notice of intention to withdraw as counsel, I do not consider his conduct in giving that notice warrants a disciplinary response.

[139] Although, in my view, it would have been preferable had Mr GB given that notice to Ms SL before he told the vendors' counsel a few minutes earlier, the fact he did not would not have disadvantaged Ms SL and Ms CS in that brief time, and therefore ought not, in my view, give rise to any professional issues for Mr GB.

[140] Concerning the fees recovery aspect of Ms SL's complaint, again, taking into account the communications, at times lengthy and detailed, exchanged between the parties concerning the payment of Mr GB's and Ms PR's fees, I do not consider Mr GB's acknowledged "error" in instructing a debt collector on 27 February 2017, a day earlier than he said he would, calls for a disciplinary response.

[141] Particularly, as Mr GB says, he withdrew those instructions following receipt of the Law Society's notice of Ms SL's complaint.

Decision

[142] I have found that by not providing Ms SL with the advice she requested in her 3 May 2016 email about her and Ms CS's proposal to approach the vendors' lawyers direct about a possible settlement of the dispute, Mr GB contravened r 7.1.

[143] Although it is open to me to make an unsatisfactory conduct finding against Mr GB under s 12(c) of the Act, by a relatively close margin I have decided to exercise my discretion not to do so for the following reasons.

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[39] *Q v Legal Complaints Review Officer* [2012] NZHC 3082 at [59].
[40] *Wilson v Legal Complaints Review Officer* [2016] NZHC 2288 at [43].

[144] First, a breach of the Rules or the Act, if established, does not automatically attract a disciplinary sanction.[41] In conducting a review, a Review Officer may exercise any of the powers that could have been exercised by the Standards Committee in the proceedings in which the decision was made or the powers were exercised or could have been exercised.[42]

[145] Included in those powers, is the ability to exercise a discretion to take no action, or no further action on the complaint.[43] That discretion may be exercised in circumstances where the Committee (or Review Officer on review), having regard to all the circumstances of the case, determines that any further action is unnecessary or inappropriate.[44]

[146] In that regard, it is evident that Ms SL's 3 May request for advice, and Mr GB's 4 May approach to the vendors' counsel were overtaken by the events, referred to above, which immediately followed, namely, Ms SL's 6 May instructions to Mr GB to submit a settlement offer of $485,000.

[147] In such circumstances, and at a distance of nearly five years since those events took place, it is not possible to say with any degree of certainty what the outcome might have been had Mr GB consulted with Ms SL about her 3 May request for advice before approaching the vendors' counsel the following day.

[148] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee on all issues considered that any further action on Ms SL's complaint was unnecessary or inappropriate is confirmed.

Anonymised publication

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

[150] I do so, because the facts of this matter serve to highlight that unless a lawyer has accepted instructions to provide legal services to a client without payment, it serves

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[41] Sections 138(1) and (2) of the Act; *Burgess v Tait* [2014] NZHC 2408 at [82], affirmed in *Chapman v Legal Complaints Review Officer* [2015] NZHC 1500 at [47].
[42] Section 211(1)(b) of the Act.
[43] Section 138 of the Act.
[44] Section 138(2) of the Act.

neither the client nor the lawyer to permit non-payment by the client to continue without the lawyer identifying, and addressing the client's reasons for non-payment.

[151] Such a situation, as occurred in this matter, could lead to a loss of trust and confidence by each party in the other and give rise to a formal complaint, as it did in this matter, by the client about the client's concerns which might otherwise have been resolved.

DATED this 29th day of January 2021

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B A Galloway
Legal Complaints Review Officer

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

Ms SL, as the Applicant
Mr GB, as the Respondent
[Area] Lawyers Standards Committee
New Zealand Law Society