LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 167

Ref: LCRO 182/2017

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the National Standards Committee
BETWEEN	**TP** Applicant
AND	**ZN** Respondent

DECISION

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

Introduction

[1] Mr TP has applied to review a determination made by the National Standards Committee on 16 August 2017, in which the Committee made findings of unsatisfactory conduct against him concerning his conduct when acting for Mrs ZN.

Background

Mrs ZN and [Firm B]

[2] Mrs ZN's home was [the subject of litigation].

[3] [Business A] made a payment to Mrs ZN, and she also made a claim with her [insurer].

[4] Disagreement ensued between Mrs ZN and her insurer concerning [redacted] issues.

[5] In early 2014 Mrs ZN engaged [Firm B] to assist with pursuing a claim against her insurer. [Firm B] is not a law firm but assists clients such as Mrs ZN with [disputes].

[6] When necessary, [Firm B] will arrange for a client to be legally represented.

[7] The fee arrangements between [Firm B] and its clients operate on what is colloquially known as a "no win, no pay" basis. In the event of a successful claim on behalf of a client, [Firm B] is entitled to a percentage of the amount received by their client.

[8] Irrespective of the outcome of any [litigation], [Firm B]'s clients are expected to reimburse [Firm B] for its out-of-pocket expenses such as expert reports, legal fees, court filing fees and so on.

[9] Clients and [Firm B] record these arrangements in a written contractual document, which has been described as a service agreement.[1]

Mr TP and [Firm B]

[10] Mr TP was one of [Firm B]'s preferred providers of legal services to its clients. He had an arrangement with [Firm B] whereby he invoiced it for his legal fees and disbursements. His fees were calculated on the High Court Rules 2016's categorisation of proceedings and time allocation schedules, on a 2B basis.

[11] Mr TP's legal fees were paid by [Firm B] irrespective of the outcome of any case he did on behalf of a [Firm B]-referred client.

Mr TP engaged by [Firm B] to act for Mrs ZN

[12] In June 2014 [Firm B] engaged Mr TP to issue proceedings against Mrs ZN's insurance company, in the High Court at [City A] (the proceedings).

[13] The proceedings were issued by him on 1 July 2014.

Legal work

[14] Mr TP was assisted by another lawyer then employed in his law firm, Mr VB. By 2014 Mr VB could reasonably have been described as a senior lawyer with experience in legal work of this type.

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[1] The document itself prominently refers to the arrangement between [Firm B] and Mrs ZN as being a "Partnership [Programme]".

[15] Several days after he lodged the proceedings, Mr TP provided Mrs ZN with what is generally known as client care information, spread across three different documents. This included information about Mr TP's fees. I discuss that material in more detail later in my decision.

[16] Between 2014 and 2016 there were unsuccessful attempts by Mrs ZN and the insurer, through their respective lawyers, to settle the proceedings.

[17] The proceedings thus made their way through the High Court's various case management processes and were scheduled to be heard as a defended trial beginning on Tuesday, 26 April 2016.

Trial does not proceed

[18] Late in the afternoon of Sunday 24 April 2016 Mr VB spoke to Mrs ZN about a settlement offer that Mr TP had then just received from the insurer's lawyers. Mrs ZN was asked to consider the offer and give instructions about it.

[19] Mr VB spoke again to Mrs ZN by telephone. He understood her to have instructed him to settle the proceedings with her insurer on the terms that they had discussed less than 30 minutes earlier.

[20] Mr VB immediately informed Mr TP, who in turn immediately notified the insurer's lawyers that settlement was confirmed. He did so by text message at about 6 pm on Sunday 24 April 2016.

[21] Later that evening, in an email to Messrs TP and VB, Mrs ZN said that she had decided not to accept the settlement offer.

[22] Mr VB replied and said that her acceptance of the offer had already been conveyed to the insurer's lawyers.

[23] On the following day, being ANZAC day (and a public holiday), from the early hours of the morning until mid-morning there were a number of email exchanges between Mrs ZN and Messrs TP and VB, in which Mrs ZN repeated that she would not be accepting the insurer's offer. Messrs TP's and VB's positions were that she had accepted the offer and this had been conveyed to the insurer's lawyers.

[24] From late morning on, Mr TP endeavoured to contact Mrs ZN to discuss the position further, but he was unsuccessful.

[25] Close to 10 pm on Monday 25 April 2016 Mr TP informed the High Court by email that the proceedings had been settled. On the following day the Court noted that settlement had been achieved and a judge adjourned the proceedings to allow settlement to be implemented, and for further review to monitor that.

Settlement agreement and case review

[26] Between 26 April 2016 and 2 May 2016 Mr TP and the insurer's lawyers confirmed the settlement details in a written agreement. Mr TP sent this to Mrs ZN on 2 May 2016.

[27] Mrs ZN emailed Mr TP on 4 May 2020, expressing her unhappiness.

[28] Later in May 2016 Mr TP received a letter from another lawyer who said that he was now acting for Mrs ZN. The lawyer attached an uplift authority for Mrs ZN's file.

[29] The proceedings were due for review in the High Court on 16 June 2016.

[30] On 7 June 2020 Mrs ZN telephoned the Court and informed a case officer that she did not consider the proceedings to have been settled.

[31] An Associate Judge directed Mr TP to file a memorandum "explaining the position as he sees it", and to do so by 9 June 2020 (the memorandum).[2] Mr TP did so and, amongst other things, said in the memorandum that Mrs ZN was wrong to believe that the proceedings had not been settled.

[32] Subsequently Mr TP filed an application seeking to be removed as counsel acting for Mrs ZN. He swore an affidavit in support of that application, to which he annexed the memorandum. The court granted Mr TP leave to withdraw as Mrs ZN's counsel.

Proceedings between the parties

[33] Towards the end of 2016, [Firm B] issued proceedings against Mrs ZN in the District Court seeking payment of fees and disbursements it claimed that she owed under the service agreement.

[34] Mrs ZN filed a statement of defence, and a counterclaim against [the firm]. One of the issues pleaded by her was there was no settlement between her and the insurer.

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[2] Minute of Matthews AJ (7 June 2016).

[35] Mr TP has since been joined to those proceedings. They have been transferred to the High Court for trial in October of this year.

Complaint

[36] Mrs ZN lodged her complaint against Mr TP with the New Zealand Law Society Complaints Service (Complaints Service) on 13 July 2016. She supplemented that complaint on several occasions in further correspondence.

[37] Because the issues I am to consider on review have narrowed somewhat, I do not propose to set out every complaint issue raised by Mrs ZN.[3] For the purposes of Mr TP's review application, Mrs ZN's complaints may be summarised as follows:

(a) Mr TP failed to provide her with adequate client care information.

(b) Mr TP's fee arrangements were at best unclear and may have been a conditional fee arrangement.

(c) Mr TP incurred disbursements on her behalf by engaging experts without her instructions to do so.

(d) Mr TP improperly informed the High Court that the proceedings had been settled; improperly continued to negotiate settlement terms with the insurer and disclosed privileged information about her retainer with him to the High Court and the insurer.

[38] As well, Mrs ZN complained that Mr TP failed to give her adequate advice before filing the proceedings in the High Court in July 2014.

[39] Mrs ZN also claimed compensation from Mr TP for the steps that she considered she was obliged to take after settlement had been confirmed. This included instructing another lawyer and filing a statement of defence and counterclaim in [Firm B]'s claim against her.

[3] In a letter to this Office dated 5 December 2017, responding to Mr TP's application for review, Mrs ZN identified "six specific issues for the Review Officer to consider". They are said by her to have arisen out of her complaint and the Standards Committee's determination. I address those "specific issues" in my decision at [112]–[144].

Response by Mr TP

[40] Through his counsel Mr CF, Mr TP provided detailed responses to all of Mrs ZN's complaint correspondence. As well, he provided submissions addressing the issues raised by the Committee in its Notice of Hearing.

[41] In summary, Mr CF submitted:

(a) Although Mr TP's client care information could better have expressed the arrangements concerning his fees, during the course of his retainer with Mrs ZN either he, Mr VB or another member of his staff had discussions with her on several occasions explaining the basis of his fees.

(b) Mrs ZN had no liability to Mr TP directly for fees so therefore there was no conditional fee agreement with her.

(c) Instructions had been given by Mrs ZN to engage experts. In relation to one expert, after his engagement Mrs ZN said that she did not want to use him. Her suggested alternative was ultimately unavailable and because of pressure of time it was necessary to engage another at short notice.

(d) Because Mrs ZN had agreed to settle the proceedings at approximately 6 pm on 24 April 2016 on what was effectively the eve of the trial, Mr TP had a duty to the court to inform it in advance that the trial was not proceeding.

(e) Mr TP did not continue to negotiate settlement terms with the insurer after settlement had been confirmed by Mrs ZN. He and the insurer's lawyers were merely confirming terms that had been previously agreed and committing them to an agreement for their clients to execute.

(f) Although Mr TP's retainer with Mrs ZN had come to an end by the time her new lawyer wrote to him on 26 May 2016, that lawyer did not formally notify the court that he was acting. Shortly before the proceedings were due for a case review Mrs ZN informed the court that the matter had not been settled. Because Mr TP was still on the record as Mrs ZN's counsel, the court asked him to explain the position in a memorandum, which he was obliged to do.

(g) The memorandum that Mr TP prepared and filed had been requested by the court, was appropriate and did not disclose any confidential or privileged information.

Standards Committee determination

[42] The Standards Committee delivered its decision on 16 August 2017. In relation to the review issues that I am to consider, the Committee identified the following matters to be determined by it:[4]

(a) Do Mr TP's fee arrangements in relation to Mrs ZN's claim against her insurer, amount to a conditional fee agreement as defined in s 333 of the Lawyers and Conveyancers Act 2006 (the Act)?

(b) If so, did Mr TP comply with rr 9.8 to 9.12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)?

(c) Did Mr TP comply with r 3.4 of the Rules by, for example, providing Mrs ZN in advance with information in writing as to the basis upon which she would be charged fees?

(d) Did Mr TP have authority from Mrs ZN to incur the following disbursements on her behalf:

(i) [Expert A]– $1,017.75.

(ii) [Expert B] – $5,893.75.

(e) By advising the High Court that Mrs ZN's claim against her insurer had settled and requesting that the hearing be vacated, did Mr TP breach r 13.3 of the Rules?

(f) Did Mr TP continue settlement negotiations with the insurer's lawyers following Sunday 24 April 2016, in the absence of instructions from Mrs ZN? If so, does this amount to a breach of r 13.3 of the Rules?

(g) Did Mr TP breach obligations to Mrs ZN by filing in the High Court his memorandum dated 7 June 2016 and affidavit dated 27 June 2016? Did

[4] Standards Committee determination at [24] and following.

> doing so breach rr 8, 8.1 and/or 8.3 of the Rules? Was disclosure justified pursuant to rr 8.2(d), 8.4(a) and/or 8.4(g) of the Rules?

Conditional fee?[5]

[43] The Committee noted that Mr TP said that "his fee arrangements in relation to Mrs ZN did not amount to a conditional fee agreement because he is entitled to be paid by [Firm B] irrespective of success."

[44] However, the Committee did not accept this submission, saying that it overlooked Mr TP's contractual arrangements with Mrs ZN. Mrs ZN considered that she was only liable to pay legal fees if the proceedings against insurer were successful which, the Committee said was "stated expressly in Mrs ZN's contract with [Firm B]."

[45] The Committee held that Mr TP's terms of engagement with Mrs ZN "expressly adopt the position under the [Firm B] agreement". Those terms included the following:

> My fees are paid in accordance with your agreement with [Firm B] once you are successful.

[46] Having noted the definition of a conditional fee agreement in s 333 of the Act, the Committee held that Mr TP had agreed with Mrs ZN "that some or all of his fees and expenses for the provision to her of advocacy or litigation services in respect of the matter with her insurer [were] payable only if the outcome of that matter was successful."

[47] As a consequence of Mr TP having a conditional fee agreement with Mrs ZN, the Committee further held that he had breached the obligations which flow from such an agreement, found in rr 9.8 to 9.12 of the Rules.

[48] The Committee found these breaches were "material and not merely technical" and "were of important obligations intended to ensure that clients understand the aspects of a fee agreement on which they are particularly vulnerable."

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[5] Standards Committee determination [31]–[37].

Client care information in advance?[6]

[49] The Committee noted that Mr TP emailed his client care information to Mrs ZN on 10 July 2014, by which time he had filed and served her proceedings against the insurer.

[50] The Committee held that this information had not been provided "in advance" and was therefore "too late to constitute compliance with [Mr TP's] professional obligations."

[51] As well, having held that Mr TP had a conditional fee agreement with Mrs ZN, the Committee further held that the totality of Mr TP's client care information "did not inform Mrs ZN of the basis on which [his] legal fees would be charged."

[52] Aspects of Mr TP's client care information were described by the Committee as "inapt and potentially misleading", noting that it referred to monthly invoicing by him, whereas the service agreement required payment of legal fees on settlement of Mrs ZN's proceedings.

[53] The Committee noted Mrs ZN's ongoing queries with Mr TP (and others in his law firm) about legal fees, and described this as evidence of "a disconnect" between the two. It held that "this disconnect may well have been avoided if Mr TP had sent compliant terms of engagement/client care information to Mrs ZN at the outset."

[54] The Committee held that this was a breach by Mr TP of his obligations pursuant to r 3.4(a) of the Rules, and that this was a "material and not merely technical" breach.

Disbursements without instructions?[7]

[55] The Committee noted that Mrs ZN emailed Mr VB on 16 March 2016 and instructed him not to engage [Expert A] as a structural engineer, saying that she preferred to engage Mr M or someone from Mr M's firm.

[56] Mr VB nevertheless engaged [Expert A] (who later withdrew), as well as [Expert B]. Mrs ZN said that this was done without her knowledge and after she had told Mr VB not to engage anyone in the future without her agreement.

[57] The Committee did not accept Mr TP's explanations for engaging experts other than those authorised by Mrs ZN.

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[6] Standards Committee determination [38]–[46].
[7] Standards Committee determination at [53]–[58].

[58] Turning to rr 7.1 and/or 13.3 of the Rules, the Committee observed that these required Mr TP "to consult with Mrs ZN prior to his firm engaging third parties on her behalf." Because the disbursements incurred were not insignificant (some $6,900), the Committee considered that this created a positive obligation on Mr TP's part to consult with Mrs ZN before engaging the experts.

[59] The Committee thus determined that Mr TP did not have authority to incur these two sets of disbursements.

[60] This was said by the Committee to be a breach of rr 7.1 and/or 13.3 of the Rules, and was unsatisfactory conduct pursuant to ss 12(a), (b) and/or (c) of the Act. Mr TP was directed to write-off those disbursements.

Advising the High Court about settlement[8]

[61] The Committee began its consideration of this issue by setting out r 13.3 of the Rules. It provides:

> **Informed instructions**
>
> Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them.

[62] In an email dated Monday 25 April 2016, and sent at 9.57 pm, Mr TP informed the High Court that Mrs ZN's claim against the insurer had been settled, and that the hearing, scheduled to begin the following day, could be vacated.

[63] Prior to that, Mrs ZN had sent four emails to Mr TP or his law firm, resiling from her acceptance of the insurer's offer. That acceptance had been conveyed to the insurer by Mr TP at approximately 6 pm on Sunday, 24 April 2016.

[64] The Committee noted that Mr TP had, before sending his email to the court, sent an email to Mrs ZN in which he said "if you want to now say that you did not communicate acceptance to [Mr VB] then we cannot act for you."

[65] The Committee considered that Mr TP's email to the High Court was a breach of r 13.3 of the Rules. It held that not only did he act in the absence of instructions, but also contrary to Mrs ZN's express instructions.

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[8] Standards Committee determination at [71]–[77].

[66] This was seen by the Committee as "a serious breach". However, the Committee accepted that:

> Mr TP considered that Mrs ZN had accepted the offer from her insurer and that he considered he was acting in her best interests by vacating the hearing in order to document the intended settlement.

[67] Noting that Mr TP had "professional difficulties" because, on the one hand he had communicated Mrs ZN's acceptance of the insurer's offer (albeit without speaking to her about that), yet on the other hand Mrs ZN subsequently instructed him that she did not accept that settlement had been concluded. In that event, the Committee held that there was potential for Mr TP to be a witness if the insurer asserted that settlement had occurred.

[68] Recognising that difficulty, the Committee's view was that Mr TP should:

(a) have contacted Mrs ZN directly to confirm her instructions;

(b) then inform the insurer, if instructed to do so, that the offer had been rejected and that Mrs ZN did not accept that settlement terms had been agreed.

If the insurer asserted that settlement had been agreed, Mr TP would then be expected to:

(a) apply to the court for an order granting leave to withdraw and seek an adjournment of the trial (thereby terminating the retainer); and

(b) give Mrs ZN reasonable assistance to find another lawyer (in accordance with r 4.2.4 of the Rules).

Ongoing negotiations?[9]

[69] The Committee concluded that Mr TP "continued settlement negotiations" with the insurer's lawyers from Monday, 25 April 2016, in the absence of any instructions from Mrs ZN. As with his email sent to the High Court, discussed above, the Committee said that this was a breach by Mr TP of r 13.3 of the Rules.

[70] The Committee held that it was significant that Mrs ZN had sent four emails to Mr TP by the morning of Monday, 25 April 2016 saying that she did not accept the insurer's offer and that she wished to proceed with the hearing.

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[9] Standards Committee determination at [78]–[81].

[71] There was no material before the Committee to indicate that Mrs ZN had instructed Mr TP to continue negotiations with the insurer; as with the email issue, the material was to the opposite effect.

[72] The Committee did not accept Mr TP's explanation that he was "simply documenting the agreement" that had been reached by 6 pm on Sunday, 24 April 2016.

High Court memorandum[10]

[73] In a Minute dated 7 June 2016, an Associate Judge directed Mr TP to file a memorandum reconciling Mr TP's advice to the court on 25 April 2016 that the proceedings had settled, with Mrs ZN's message to the court on 7 June 2016 the matter had not settled.

[74] The Associate Judge said that "Mr TP [was required to explain] the position as he sees it."

[75] On the same day, Mr TP prepared and filed a memorandum which he said the following (relevantly):

> 1 Mrs ZN is wrong to say that she did not agree to settle this proceeding.
>
> …
>
> 3 At 5.55pm on 24 April 2016 [Mrs ZN] instructed my firm to accept the extent offer from [the insurer]. I communicated acceptance to [the insurer] by text message … at 6pm.
>
> 4 As of then there was a settlement and I communicated the fact of the settlement to the court.
>
> 5 Mrs ZN then apparently wanted to reconsider and refused to cooperate with finalising the settlement. She did not respond to phone calls and emails.
>
> …
>
> 12 I have no instructions from Mrs ZN. She has new legal representation. I seek an order under r5.41 that I have ceased to act for [Mrs ZN]. …

[76] The Committee said that the issue for it to consider was whether Mr TP had breached any obligations of confidentiality that he owed to Mrs ZN.

[77] The Committee noted that rr 8, 8.1 and 8.3 of the Rules applied, as follows:

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[10] Standards Committee determination at [82]–[92].

> **Confidential information**
>
> 8 A lawyer has a duty to protect and hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.
>
> **Duration of duty of confidence**
>
> 8.1 A lawyer's duty of confidence commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not a retainer venture's). The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client.
>
> …
>
> 8.3 Where a lawyer discloses information under this rule, it must be only to an appropriate person and only to the extent reasonably necessary for the required purpose.

[78] The Committee held that Mr TP breached those obligations in his Memorandum. It held that he had disclosed Mrs ZN's confidential information beyond the extent reasonably necessary for the required purpose.

[79] The Committee noted that the circumstances confronting Mr TP were "unusual". Mr TP was no longer acting for Mrs ZN, he still had her file and was still counsel on the record as far as the court was concerned. It held that "a minimal response with an explanation of the professional difficulties faced was appropriate."

[80] Explaining that, the Committee observed:

> all that Mr TP should have done was to say that an issue had arisen about whether a settlement had been concluded and that as a result of his involvement in those events it was no longer appropriate for him to continue to act for Mrs ZN as the plaintiff.

[81] The Committee held that "this was a serious professional failing by Mr TP."

Summary of Committee's findings

[82] The Committee made three findings of unsatisfactory conduct:

(a) Mr TP did not comply with the client care requirements of rr 3.4, 9.8 and 9.10 of the Rules.

(b) Mr TP did not obtain authority from Mrs ZN to engage two separate experts, in breach of rr 7.1 and/or 13.3 of the Rules.

(c) Conduct by Mr TP after Sunday, 24 April 2016 breached rr 8, 8.1, 8.3 and 13.3 of the Rules.[11]

Penalty

[83] The Committee:

(a) Censured Mr TP.

(b) Directed Mr TP to either write off the two experts' disbursements, or refund them to Mrs ZN if she had paid them.

(c) Ordered Mr TP to pay a fine of $8,000.

(d) Ordered Mr TP to pay costs of $3,000.

Application for review

[84] Mr TP lodged his application for review through Mr CF, on 16 August 2017. In summary it was submitted:

(a) The Committee erred in fact and law in finding that there was a conditional fee agreement.

(b) The Committee ought to have conducted a hearing in person.

(c) The Committee failed to take relevant facts into account, including:

(i) Mrs ZN had been unresponsive and uncooperative after instructing Mr TP to settle the proceedings.

(ii) Mrs ZN understood the fees arrangement.

(iii) Because the matter had settled, Mr TP was obliged to inform the court.

(iv) It was wrong to say that Mrs ZN had instructed Mr TP that she did not accept that settlement had been concluded.

(v) The complaint against Mr VB that he had engaged experts without instructions had been dismissed by the same Committee, yet it made a finding on this issue against Mr TP.

[11] In particular: notifying the court of settlement; negotiating with the insurer's lawyers and breaching the obligation of confidentiality in his 7 June 2016 memorandum.

(vi) The Committee was wrong to say that Mr TP had breached his obligations of confidentiality to Mrs ZN.

Response by Mrs ZN

[85] In a letter to the Case Manager dated 5 December 2017, Mrs ZN's then-counsel said that Mrs ZN supported the Committee's findings and conclusions including the penalty imposed.

[86] Six matters were raised on behalf of Mrs ZN which required consideration as part of the review. I deal with those in detail in my reasoning further below.

Nature and scope of review

[87] 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.

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

[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].

[89] 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 the available material afresh, including the Committee's decision; and

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

Hearing in person

[90] The review was progressed before me at a hearing in Auckland on 8 June 2020. Mr TP appeared with his counsel [Counsel A]. Mrs ZN appeared with her counsel [Counsel B], by audio visual link from [Counsel B's] office in [City A].

[91] In advance of the hearing both parties filed detailed written submissions and bundles of authorities.

[92] The hearing lasted a full sitting day. All issues were comprehensively traversed with the parties (or their counsel).

[93] I record that I have read the Standards Committee's file, which includes the parties' submissions to it. I have read the parties' submissions in relation to the application for review, and as indicated I have also heard from the parties (principally through their counsel), in person.

[94] In total, the material before me comprises four Eastlight folders and several bound volumes of submissions and other documents.

[95] Additional and brief submissions, requested by me at the conclusion of the hearing, were provided by counsel in writing some days later. Those additional submissions concern preliminary and jurisdiction matters which I discuss below at [112]–[144].

[96] I confirm that there are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either party.

Analysis

Adjournment application

[97] Mr TP has pressed for his application for review to be adjourned pending the outcome of the High Court proceedings between [Firm B], Mrs ZN and himself due to be heard in October of this year.

[98] Mr TP submitted that all of the issues engaged by Mrs ZN's complaint to the Complaints Service, are before the High Court. He argued that the High Court is the appropriate forum in which to hear those issues, as the parties will be giving evidence and cross-examined. He submitted that this is the best way of resolving the disputed issues between himself and Mrs ZN.

[99] Mr TP noted that as this is his application for review in which he is seeking to have findings of unsatisfactory conduct overturned, it cannot be said that by asking for an adjournment he is endeavouring to delay the review process for his own benefit.

[100] Further, Mr TP argued that the delay until the High Court finally deals with the proceedings before it, is unlikely to result in any prejudice to the parties involved in this review application.

[101] For her part, Mrs ZN is pushing for the review application to be heard and determined so that her conduct complaints are finalised.

[102] I agree with Mr TP that where there are contested issues of fact before a Standards Committee or a Review Officer, and parallel proceedings involving the same parties proceeding in a conventional adversarial jurisdiction, there is merit in awaiting the outcome of the parallel proceedings before dealing with a complaint or review hearing.

[103] The reason for this is tolerably clear: disciplinary proceedings before a Standards Committee are presumptively papers-based. Review proceedings in this jurisdiction (when heard in person) proceed along inquisitorial lines rather than conventional adversarial lines. There are no interlocutory steps such as might be found in conventional civil proceedings, and at the review hearing itself witnesses are not called, evidence is not given and there is no cross-examination.

[104] Whether to adjourn a matter in this jurisdiction pending the outcome of related proceedings in another jurisdiction, will fall to be determined on a case to case basis.

[105] When I initially assumed case management responsibilities for this review application during 2018, I had some sympathy with Mr TP's position. However, I have subsequently come to the conclusion that the substantive disciplinary issues before me do not, in fact, involve any contested issues of fact as between Mr TP and Mrs ZN (with the exception of matters referred to by me below at [114]–[127]).

[106] My assessment is that each of the review issues are capable of determination on the basis of the material that was before the Committee, and such additional material as has been put before me (including the oral submissions made on behalf of the parties by their counsel). When analysed, I conclude that there is no dispute between the parties about the background facts giving rise to the conduct issues.

[107] Later in my decision I set those conduct issues out, although it can be said that they are largely the same as those outlined by me above at [37], as being the areas in which the Committee made findings of unsatisfactory conduct against Mr TP.

[108] Moreover, proceedings of a disciplinary nature – whether before a Standards Committee or a Review Officer – are required to be dealt with expeditiously.[14] Mrs ZN's complaint against Mr TP was first lodged by her in July 2016. The Committee released its determination 13 months later in August 2017. Mr TP filed his application for review almost immediately after the Committee's determination had been released.

[109] The review application is at its three-year anniversary in this Office. Even if the High Court litigation proceeds as presently anticipated in October, there is no guarantee that judgment will be delivered before the end of this year.

[110] Moreover, either party may appeal the High Court's judgment thus delaying matters even further.

[111] To delay resolution of Mr TP's application for review until quite possibly 2021 at the earliest, would be to significantly diminish observance of the requirement to deal with complaints and review applications, expeditiously.

[14] Section 120(2)(b) of the Act.

Preliminary matters

[112] There are some preliminary matters to deal with before I turn to the substantive application for review and Mrs ZN's response to it. These were discussed with counsel at the hearing and have been the subject of brief written submissions filed by counsel after the hearing. They include:

(a) Issues currently before the High Court.

(b) Issues not considered by the Committee.

(c) Challenges to Committee processes.

[113] I now deal with each of those preliminary matters.

Issues currently before the High Court

[114] There are some issues before me which are contested, and which are also contested factual issues before the High Court. I decline to deal with those matters (which I set out further below) because they are contested and can only adequately be resolved through a conventional trial procedure such as described by me above.

[115] If the result of that trial gives rise to conduct issues on Mr TP's part, then they may be looked at through a disciplinary lens at an appropriate time.

[116] The issues in this category include the question of whether or not there was a binding settlement between Mrs ZN and the insurer from 6 pm on Monday, 24 April 2016, and the issue of compensation for Mrs ZN from Mr TP.

[117] Both counsel have agreed that these are matters best left for the High Court to grapple with.

[118] As well, there is an issue identified by then-counsel for Mrs ZN in her 5 December 2017 letter to this Office, as follows:

> 4c [T]he [Committee] erred in finding on the evidence before it that Mr TP's conduct, in attempting to settle Mrs ZN's claim in the manner that occurred, did not reach the threshold to amount to unsatisfactory conduct.

[119] One of the issues in the litigation presently before the High Court is whether there was a settlement reached between Mrs ZN and the insurer on the evening of 24 April 2016, to which both are bound.

[120] Inextricably linked with that issue, in my view, is whether Mr TP complied with his professional obligations to Mrs ZN in advising her about settlement in the lead up to him sending the insurer's lawyers acting, a text message confirming that there was indeed a settlement between their respective clients.

[121] In its determination the Committee framed this issue as being whether "Mr TP [had] authority from Mrs ZN to settle her claim against her insurer".[15]

[122] The Committee said the following about that issue:

> [59] The [Committee] has serious reservations about the manner in which Mr TP sought to settle Mrs ZN's claim against her insurer. These reservations are outlined below. Despite these concerns, the [Committee] determines by a narrow margin at Mr TP's conduct in this regard does not reach the threshold to amount to unsatisfactory conduct pursuant to s. 12 of the Act. *It is a matter for the High Court to resolve the legal (as opposed to professional conduct) issue of whether or not Mrs ZN's claim against her insurer is settled as a matter of fact and law.* [Emphasis added]
>
> ….
>
> [63] …[T]he [Committee] considers that, on the balance of probabilities, Mr TP had been authorised by Mrs ZN to accept terms offered by the insurer when he communicated acceptance, and that Mrs ZN's later retraction followed his communication of her acceptance.

[123] I have difficulty separating out the conduct issue of whether Mr TP properly advised Mrs ZN about settlement, from the Committee's finding that she authorised him to finalise settlement.

[124] I would have thought that from a conduct perspective, fundamental to any instruction to a lawyer to settle a matter (or not), is comprehensive advice by the lawyer including the pros and cons of doing so, the terms to be agreed including any limitations and the implications of settlement. Only then could it truly be said that "authority to settle" had been given.

[125] I am not prepared to make a finding one way or the other as to whether that occurred in this instance. The Committee held that instructions to settle were given without, in my view, paying sufficient attention to the lead up to Mr TP's text message to the insurer's lawyers in which he confirmed settlement.

[126] That is clearly a contested issue as Mrs ZN asserts she did not receive adequate advice and indeed was placed under some duress, whereas Mr TP has said that Mrs ZN

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[15] Standards Committee determination at [24](h).

had been fully and carefully advised about the settlement and that her later retraction was simply a case of buyer's remorse.

[127] Undoubtedly that will be part of the factual matrix for the High Court to consider when it looks at the overall question of whether there was, as a matter of law, a settlement between Mrs ZN and the insurer.

Matters not considered by the Committee

[128] Mr TP lodged his review application well within the 30-working day requirement under s. 198 of the Act.

[129] In responding to Mr TP's review application, in a letter to this Office dated 5 December 2017, through her counsel Mrs ZN raised what she described as "six specific issues for the Review Officer to consider."[16]

[130] Those "six specific issues" are to all intents and purposes a cross-application for review.

[131] Self-evidently this was lodged by Mrs ZN well outside the 30-working day requirement. No filing fee was paid, as is required when any application for review (which includes a cross-application) is lodged.

[132] Mr TP has not objected to me considering these "six specific issues". Clearly, I may do so because of the broad review jurisdiction enjoyed by a Review Officer, which involves looking at all matters that were before the Committee and arriving at an independent conclusion about them.

[133] Nevertheless, in relation to some of the "six specific issues" raised by Mrs ZN, there are difficulties.

[134] After discussion with counsel at the hearing on 8 June 2020, it was agreed that some of those issues ought to be returned to the Committee for it to consider afresh. This is on the basis that they were before the Committee but not considered by it.

[16] I have dealt with two of those six issues immediately above at [114]–[127]: settlement and compensation. These are issues 4(d), (e) and (f) of Mrs ZN's counsel's letter to this office dated 5 December 2017. Issues (d) and (e) are interlinked and deal with the issue of whether there was a binding settlement between Mrs ZN and her insurer.

[135] It is of course open to me to deal with those issues on review, as they are not fresh issues of complaint. Given my comments above about expeditious disposition of complaints, at first blush that is an attractive option.

[136] However, both parties were, quite reasonably, anxious to preserve their ability to lodge a review to this Office in the event that they were unhappy with Committee decisions or determinations about these previously undecided issues. It is well understood that the process of review from a Standards Committee to a Review Officer is inexpensive, informal and procedurally straightforward.

[137] On the other hand, challenge to a Review Officer's decision may only be by judicial review to the High Court. That is a much more expensive procedure than a review to this Office, and is also procedurally proscribed.

[138] Accordingly, I propose to remit to the Committee for it to consider, the following two issues:

(a) whether there are any issues of conflict in relation to Mr TP's representation of Mrs ZN, and his relationship with [Firm B]. In particular, whether rr 5.4 and/or 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) are engaged. This is issue 4(a) in Mrs ZN's counsel's letter to this Office dated 5 December 2017.

(b) Whether Mr TP complied with his obligations under rr 7.1 and/or 13.3 of the Rules when advising Mrs ZN about issuing proceedings against her insurer, prior to July 2014. This is issue 4(b) in Mrs ZN's counsel's letter to this Office dated 5 December 2017.

[139] Although Mr TP does not agree that [138](b) immediately above was before the Committee through the vehicle of Mrs ZN's complaint, I accept the submissions made by counsel for Mrs ZN that it was sufficiently raised by her in her complaint material for it to have been an issue requiring consideration by the Committee.

[140] The Committee said the following at [93] of its determination:

> The NSC reviewed and considered all of the substantive material submitted by the parties. The extent to which this determination does not specifically address each and every element of Ms [ZN's] complaint, and/or Mr TP's response to the complaint, does not mean that those aspects were not considered.

[141] The Committee referred to a decision of the Court of Appeal in which the court held that a decision-maker "is not obliged in giving its reasons for judgement to discuss every aspect of the argument."[17]

[142] However, it is one thing for a decision-maker to not mention all arguments when deciding an issue, which is what I perceive the Court of Appeal to be saying; it is another thing entirely to omit to consider a discrete issue of complaint.

[143] The Committee will of course give the parties an opportunity to be heard on the issues that I have referred back to it, before considering them and making any decision or determination about them.

[144] Despite my making this direction, it is open to Mrs ZN to reconsider whether she wants to proceed with those matters, given their age, the outcome of Mr TP's application for review and the forthcoming High Court proceedings.

Challenges to Committee's processes

[145] Through his counsel Mr TP has raised objection to the way in which the Committee determined Mrs ZN's complaint against him. He argues that the Committee ought to have exercised its discretion and directed a hearing in person before it, so that issues of credibility could be weighed up and a more fully informed determination arrived at.

[146] Mr TP considers that this puts me, as a Review Officer, at some disadvantage because there is limited information as to why the Committee came to some of its conclusions. Moreover, he says that he is also disadvantaged in the review process because of the lack of sworn evidence before the Committee.

[147] The simple answer to that criticism is that the matters I am to deal with on review are uncontested, and credibility does not arise with any of them.

[148] Moreover, as I have set out above at [87]–[89], and as the parties themselves through their counsel have acknowledged, the review process is more broadly cast than a conventional appeal or judicial review and involves me, as a Review Officer, considering afresh all material that was before the Committee and which has been

[17] *R v Nakhla (No. 2)* [1974] 1 NZLR 453 (CA) at 456.

placed before me, and robustly coming to my own independent conclusions about that material.

[149] I acknowledge that I have been greatly assisted in that task by both the written submissions of counsel as well as their oral arguments before me, where there was opportunity to test, refine, modify or reinforce those arguments.

Discussion

[150] I have identified the following issues to be considered by me:

(a) The adequacy of the client care information that Mr TP provided Mrs ZN and whether it was provided "in advance" as required by r 3.4 of the Rules.

(b) Did Mr TP have a conditional fee agreement with Mrs ZN?

(c) Did Mr TP engage experts on Mrs ZN's behalf without her instructions to do so?

(d) Post-settlement conduct:

(i) do any conduct issues arise by Mr TP informing the High Court that the proceedings between Mrs ZN and the insurer had been settled?

(ii) Do any conduct issues arise by Mr TP continuing to have dealings with the insurer's lawyers from 26 April 2016 and on?

(iii) Do any conduct issues arise in relation to the memorandum prepared and filed by Mr TP at the direction of an Associate Judge?[18]

[151] I will deal with each of these issues in turn.

[18] Mr TP subsequently filed an affidavit in an application to be removed as counsel on the record for Mrs ZN, and he annexed the memorandum as an exhibit to that affidavit. For the purposes of the review, I treat the memorandum and the affidavit as being the same and as only giving rise to one conduct issue, and so I will simply refer to the memorandum.

Client care information and conditional fee agreement

[152] I consider that these two issues are interlinked. The adequacy of fees information is directly related to the question of whether there was a conditional fee agreement between Mr TP and Mrs ZN.

[Firm B] service agreement

[153] To put this issue of complaint into context, it is important to remember that in approximately February 2014 Mrs ZN signed her service agreement with [Firm B]. This was some four or so months before [Firm B] engaged Mr TP to act on Mrs ZN's behalf.

[154] The Committee's summary of the service agreement between Mrs ZN and [Firm B] is set out in its determination at [3]–[5]. Neither party has challenged the Committee's summary. I agree with the Committee's description of the service agreement and I adopt that summary.

[155] For ease of reference I set out below extracts from the service agreement relating to legal fees (and disbursements):

> 3. The client will pay the following charges:
> (a) …
> (b) Disbursements being out-of-pocket expenses such as court filing fees, land-on-line fees and photocopying ([Firm B] may require such disbursements to be paid in advance or during the course of providing the services).
> (c) …
> (d) Costs for any third party services including without limitation legal fees and quantity surveyor fees. The client will be liable for these costs as and when they fall due under this Partnership [Programme] as per attached Service Agreement Schedule (annex).

Mr TP's client care information about fees

[156] The aspect of Mr TP's client care information which is challenged, concerns information about fees. This was what the Committee focussed on, concluding that the information was so deficient that it even omitted to explain that Mr TP and Mrs ZN had a special type of fees arrangement (a conditional fee arrangement), which has its own set of rules.[19]

[157] Mr TP has acknowledged that the information he gave Mrs ZN about fees was inadequate and did not accurately reflect how fees were to be charged and paid. He has

[19] Section 333 and following in the Act, and r 9.8 and following in the Rules.

said that his client care information has subsequently been amended by him to remove the possibility, in the future, of the sort of confusion that arose in this case.

[158] It is plain that Mrs ZN found the question of legal fees, confusing. Both parties agree that Mr TP's office fielded a number of queries about fees from Mrs ZN during the retainer, and that time was spent with her in person explaining how fees were calculated and arrived at, including with the assistance of a spreadsheet.

[159] Mr TP said that Mrs ZN should not have been confused about the position because of the time spent explaining things to her. However, she plainly was, and continued to be confused, because of the number of queries that she made about fees.

[160] I have considerable sympathy for Mrs ZN's confusion.

[161] Mr TP's client care information for Mrs ZN was set out in three separate documents. It is difficult to understand why it was necessary to set all of this information out in three documents: one could have sufficed.

[162] The fact that it was in three documents, in my view only serves to add to the confusion.

[163] The documents began with Mr TP's letter to Mrs ZN dated 9 July 2014, which is a single page document containing information about "engagement" (or the scope of his retainer), fees and "actions", being the description of what steps Mr TP had taken and what might happen in the future. I will refer to this first document as the letter of engagement.

[164] The letter of engagement referred to two further documents, described as "Information for clients", and "Terms of engagement".

[165] Fees information is contained in both the information for clients, and the terms of engagement; although each refers back to the letter of engagement.

[166] Because the core criticism of Mr TP's client care information relates to his explanation about fees, it is important to set out what the three documents say about this:

> **Letter of engagement:**
>
> …
>
> <u>Fees</u>

> 2 My fees are paid in accordance with your agreement with [Firm B] once you are successful. You have paid the court filing fee.
>
> And:
>
> **Information for clients**
>
> 1 Fees: The basis on which fees will be charged as set out in my letter of engagement. When payment of fees is to be made set out in my Standards Terms of Engagement.
>
> And:
>
> **STANDARD TERMS OF ENGAGEMENT**
>
> …
>
> 2.1 Fees:
>
> (a) The fees I charge or the manner in which they will be arrived at, are set out in my engagement letter.
>
> …
>
> (c) Where my fees are calculated on an hourly basis, the hourly rates are set out in my engagement letter. Time spent is recorded in six minute units, with time rounded up to the next unit six minutes.
>
> 2.2 **Disbursements and expenses:** In providing services I may incur disbursements or have to make payments to 3rd parties on your behalf. These will be included in my invoice to you when the expense is incurred. I may require an advance payment for the disbursements or expenses which I will be incurring on your behalf.
>
> …
>
> 2.4 **Invoices:** I will send interim invoices to you, usually monthly and on completion of the matter, or termination of my engagement. I may also send you an invoice when I incur a significant expense.

[167] The letter of engagement letter contains no information about Mr TP's hourly rates, despite the information for clients saying that it did.

[168] Moreover, and contrary to what was in the Standard Terms of Engagement, Mr TP sent his invoices to [Firm B]. It passed those on to Mrs ZN, as part of her obligation under their service agreement to reimburse [Firm B] for its out-of-pocket costs.

[169] Across all three documents which comprise the contractual arrangements between Mr TP and Mrs ZN, there is only one reference to [Firm B]. That is contained in the letter of engagement. I set it out again:

> My fees are paid in accordance with your agreement with [Firm B] once you are successful.

[170] On one reading of that sentence, it means “my fees are paid once you are successful.” That was the meaning that the Committee drew from those words.

[171] Although Mr TP has submitted that [Firm B] is contractually responsible for paying his fees, and that in the event of any default he would issue proceedings against it, none of his fees information says this, much less does it even remotely allude to it.

[172] Mr TP could simply have said something such as:

> 1 I have an arrangement with [Firm B] whereby it is responsible for payment of my legal fees in acting for you.
>
> 2 I will be sending invoices to [Firm B] for legal fees for acting for you, irrespective of the outcome of any case. The basis of the fees I will be charging [Firm B] is as follows:
>
> (a) [explanation of 2B Schedule]
>
> 3 [Firm B] has an arrangement with you about reimbursement of my legal fees.

[173] In my view a reasonable layperson-client reading Mr TP’s fees information would conclude that they are to pay his legal fees directly to him, and that any default would trigger the relevant provisions in his overall terms of engagement.[20]

[174] Rule 3.4(a) of the Rules relevantly states:

> A lawyer … must, in advance, provided in writing to a client information on the principal aspects of client service including the following:
>
> (a) the basis on which fees will be charged, when payment of fees is to be made, and whether the fee may be deducted from funds held in trust on behalf of the client….

[175] Mr TP’s fees information to Mrs ZN was muddled, inconsistent and wrong, and did not comply with the requirements of r 3.4(a) of the Rules.

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[20] See for example, interest on overdue payments referred to in paragraph 2.5 of the "Standard Terms Of Engagement".

Conditional fee agreement?

[176] In the service agreement between Mrs ZN and [Firm B], in relation to its fees (described as "commission"), the relevant part reads:

> 3. The client will pay the following charges:
>
> …
>
> c. Commission in relation to monies received on behalf of the client or received by the client directly calculated at the rate of 8% of the final settlement amount (or value as the case may be) plus GST. The minimum commission payable is $5,000 plus GST.

[177] To put the "no win no pay" arrangement beyond doubt, as the Committee recorded in its determination [Firm B] advertises that they act "on a no win no pay basis for a percentage of the final settlement…"[21]

[178] In other words, [Firm B]'s fees or commission are payable by its clients.

[179] This differs from what Mr TP has put in his fees information when he refers to his fees being "paid".

[180] The difference between "payable" and "my fees are paid", is more than semantic although I do not think that this was intentional on the part of either [Firm B] or Mr TP.

[181] When the combination of Mr TP's fees information is read together with the terms of [Firm B]'s service agreement, it is not difficult to understand how Mrs ZN was confused about Mr TP's legal fees. I repeat, Mr TP acknowledged that the overall terms of engagement could have been more carefully and clearly worded.

[182] Nevertheless, it seems clear enough to me from the terms of both contracts (the [Firm B] service agreement and Mr TP's terms of engagement), and from what the parties themselves have said about those terms of engagement, that:

(a) Mrs ZN was obliged to pay legal fees incurred on her behalf as between [Firm B] and any "third-party" service provider, which includes a legal adviser, with whom it contracts on her behalf (in this case, Mr TP).

(b) This was an obligation as between Mrs ZN and [Firm B].

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[21] Standards Committee determination at [3].

(c) This obligation existed irrespective of the outcome of any [subject of litigation] related proceedings in any jurisdiction.

(d) Separately, [Firm B] agreed with Mr TP that it would pay his legal fees, invoiced to it. Those fees were payable irrespective of the outcome of any related proceedings in any jurisdiction.

(e) [Firm B] and Mr TP agreed on how fees would be charged. In Mrs ZN's case (and presumably in the case of all other clients referred by [Firm B] to Mr TP), fees would be charged at the High Court Rules 2B rate.

[183] Significantly, neither party has submitted that Mr TP's fees arrangements with Mrs ZN amounted to a conditional fee agreement.

[184] Mr TP said that he has always taken the view that he could never sue a client referred to him by [Firm B] for unpaid fees. because the obligation to pay his fees is [Firm B]'s. Despite the fact that the Committee held there to be a conditional fee agreement between Mr TP and Mrs ZN, Mr TP still asserts that he would be unable to sue her for unpaid fees.

[185] The Committee's reasoning for concluding that Mr TP's fee arrangements with Mrs ZN amounted to a conditional fee agreement, was quite shortly stated. It said:[22]

> Mr TP's terms with Mrs ZN expressly adopt the position under the [Firm B] agreement – "*My fees are paid in accordance with your agreement with [Firm B]* ***once you are successful****".*

[186] Conditional fee agreements are defined in s 333 of the Act as follows:

> **conditional fee agreement** means an agreement under which a lawyer agrees with a client that some or all of the lawyer's fees and expenses for the provision to that client of advocacy or litigation services in respect of a matter are payable only if the outcome of that matter is successful.

[187] In my view the Committee has overlooked Mr TP's explanation for how his legal fees are paid and in this regard he has been consistent throughout. As the Committee noted, Mr TP submitted to that "he is entitled to be paid by [Firm B] irrespective of success."[23]

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[22] Standards Committee determination at [34].
[23] Standards Committee determination at [33].

[188] I consider this to be the opposite of "adopting the position under the [Firm B] agreement".

[189] It seems to be the position that the Committee was influenced by the words themselves in Mr TP's client care information. The parties and their counsel are agreed that they are less than elegantly phrased.

[190] However in my view the Committee misdirected itself by looking at the words in isolation, and by failing to give appropriate weight to what the fee earner himself has said about the arrangement, when assessing the meaning of the words.

[191] I conclude that Mr TP's fee arrangements with Mrs ZN did not amount a conditional fee agreement.

Was the fee information provided "in advance"?

[192] Rule 3.4 also requires a lawyer to provide essential information about the retainer to their client "in advance." Naturally this includes information about the basis upon which fees will be charged.

[193] Self-evidently Mr TP did not do so. He was approached by [Firm B] to act for Mrs ZN during June 2014. He filed Mrs ZN's proceedings against the insurer, on 1 July 2014. His client care information is dated 9 July 2014 and was emailed to Mrs ZN on 10 July 2014.

[194] It might be said that if Mr TP had provided Mrs ZN with his client care information at the time that [Firm B] engaged him (or thereabouts), queries about fees would have been addressed and resolved at that early stage. Indeed, that appears to have been a significant plank of the Committee's conclusion that the failure to do so, was a serious breach.

[195] Although speculative, I doubt this.

[196] Mrs ZN raised a number of queries about fees over a lengthy period of time during the course of this retainer. She did so because the written fees information was confusing, and the answers she received variously from Mr TP, Mr VB and others, did not reconcile with the written information.

[197] I doubt that Mrs ZN would have been any better off if the client care information had been provided to her before 10 July 2014. I also consider that despite uncertainties

about the fees information, she was likely to have wanted Mr TP to press on promptly with issuing the proceedings.

[198] In all the circumstances, and by a fine margin, I regard Mr TP's delay in providing the client care information as being largely a technical breach and not one deserving of a disciplinary response.

Conclusions: fees issues

[199] In conclusion therefore, I am satisfied that:

(a) Mr TP's information about fees for Mrs ZN did not adequately describe or explain the basis upon which his fees would be charged. This is a breach of r 3.4(a) of the Rules and unsatisfactory conduct pursuant to s 12(c) of the Act.

(b) Although Mr TP did not provide Mrs ZN with his client care information, including information about fees, "in advance" of beginning work on her behalf, the delay was modest and not deserving of a disciplinary response.

(c) Mr TP's fee arrangements with Mrs ZN were not in the nature of a conditional fee agreement pursuant to s 333 of the Act.

Engaging experts without instructions

[200] This issue was said by the Committee to engage rr 7.1 and 13.3 of the Rules. In simple terms, both rules require a lawyer to consult with their client and obtain their instructions about steps to be taken during a retainer.

[201] Rule 13.3 is tailor-made for litigation. I regard this as being the rule which is more correctly engaged by this issue of complaint. It reads:

> **Informed instructions**
>
> 13.3 Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them.

[202] That is not to say that a lawyer must obtain instructions about every aspect of the litigation being conducted. The learned authors in *Ethics, Professional Responsibility and the Lawyer* put it in the following way:[24]

> [It is recognised] that at the outset of the [lawyer/client] relationship, clients will expressly or impliedly consent to their lawyer conducting most of the normal incidents of the work required without further instructions.

[203] The learned authors also said the following:[25]

> Important decisions have to be made without client involvement, particularly in pressing circumstances such as in court (for example, whether to pursue a particular line of questioning) or in the midst of lawyer-to-lawyer negotiations (for example, whether to propose less advantageous settlement terms). Lawyers should anticipate the situations and discuss with the client the possible strategies the lawyer may choose to employ.

[204] Mrs ZN objects to paying the costs of the experts [Expert A] and [Expert B]. She said that [Expert A] was engaged against her express instructions, and [Expert B] was engaged without her instructions.

[205] Mrs ZN made a similar complaint against Mr VB.[26] The Standards Committee which considered the complaint against Mr TP currently under review by me, had also considered and made a determination about the complaint against Mr VB.

[206] Both counsel agree that the Committee determined to take no further action in relation to Mrs ZN's complaint against Mr VB.[27]

[207] As well, Mr VB swore an affidavit which was filed in support of Mr TP's application for review, in which he confirmed that Mrs ZN's complaint against him was not taken further by the Committee.

[208] On behalf of Mrs ZN, [Counsel B] argues that despite the Committee taking no further action on this issue of complaint against Mr VB, in the separate determination in relation to the complaint against Mr TP:[28]

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[24] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 290.
[25] At 290.
[26] In relation to Mrs ZN's complaint against Mr VB, I do not know the number or nature of issues raised by that complaint apart from the allegation that Mr VB engaged experts without her authority. It appears to be common ground that Mrs ZN made identical complaints on this issue against Mr VB and Mr TP.
[27] In her written submissions on behalf of Mr TP (3 June 2020), at [12.2] [Counsel A] summarised the Committee's reasoning for taking no further action against Mr VB on this issue of complaint. [Counsel B] on behalf of Mrs ZN, did not challenge this summary.
[28] [Counsel B]'s submissions (4 June 2020) at [36](i).

> The [Committee's] determination of who as between Mr VB and Mr TP (or both) should bear responsibility for this was that this should be Mr TP "*because the decision to charge Mrs ZN was that of the firm, not Mr VB personally, and her liability would be to the firm, not to Mr VB.*"

[209] [Counsel B] argues that Mr TP is responsible for the conduct of employed staff and "must take professional responsibility for Mr VB's conduct."

[210] On behalf of Mr TP, Ms Cameron submitted that r 13.3 does not "positively require prior consultation in all cases before a practitioner engages a third-party consultant."[29]

[211] [Counsel A] also submitted that in the past Mrs ZN "had left the engagement of experts to Mr VB."[30]

[212] In his affidavit Mr VB provided the following chronology:

(a) The insurer was late filing its briefs of evidence in the proceedings.

(b) Immediately upon being served with them, Mr VB forwarded the briefs to Mrs ZN on three different dates in early to mid-March 2016.

(c) Mrs ZN's reply briefs were due to be filed and served on 25 March 2016 (Good Friday)[Date].[31]

(d) Mr VB spoke to Mrs ZN and her builder (to whom she had given copies of the insurer's briefs of evidence) on 14 March 2016. Neither suggested experts to brief in response to the insurer's witnesses.

(e) On 15 March 2016 Mr VB asked [Expert A], a structural engineer, for comments. On that day he also spoke to Mr C, a surveyor.

(f) Later that day Mrs ZN told Mr VB that she did not want to engage [Expert A].

(g) Shortly after that [Expert A] provided Mr VB with information relevant to the insurer's experts' briefs.

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[29] [Counsel A]'s submissions (3 June 2020) at [12.9].
[30] At [12.11] and following.
[31] I understand that this meant that they were due to be filed and served on Tuesday 29 March.

(h) On 16 March 2016 Mrs ZN repeated that she did not want to instruct [Expert A], and asked Mr VB to instead instruct a Mr M or someone from Mr M's firm.

(i) Mr VB informed Mrs ZN that he had by then received a draft brief from [Expert A], and that he (Mr VB) understood that Mr M would be unable to take on the work at short notice.

(j) Sometime between 16 and 21 March 2016, [Expert A] informed Mr VB that he would not be able to give evidence in Mrs ZN's proceedings.

(k) On 21 March 2016 Mr VB spoke to Mr C as a potential expert (five working days before Mrs ZN's experts' briefs of evidence were due to be filed and served).

(l) On 22 March 2016 Mr C confirmed that he would take the matter on.

(m) On Monday, 28 March 2016 (Easter Monday) Mr C said that he could no longer take the matter on, and that a colleague in the firm in which he worked was also unavailable. Mrs ZN's briefs of evidence were due to be filed and served the following day.

(n) Mr VB said that "as a result, I did my best to find a suitable engineer who could take on the job and produce a reply brief as a matter of urgency."

(o) On 31 March 2018, he engaged [Expert B].

[213] Mr VB also said that Mrs ZN was well aware of the need to instruct experts, and that there were significant time pressures within which to finalise that. Matters were not helped by the fact that the insurer had filed its briefs of evidence, late.

[Expert A]

[214] It would seem to be the case that [Expert A] was initially approached by Mr VB because he was anxious to get on with the business of briefing Mrs ZN's experts, given the short turnaround between receiving the insurer's briefs late in the piece and the date on which Mrs ZN was timetabled to file and serve her briefs.

[215] Mr VB initially spoke to [Expert A] early in the morning on 15 March 2016. Early in the evening of the same day Mrs ZN said that she did not want [Expert A] engaged.

[216] Shortly after that, [Expert A] provided a draft report to Mr VB. Clearly, [Expert A] had spent at least a working day considering and responding to the insurer's expert evidence.

[217] Mrs ZN repeated that she did not want [Expert A] engaged, the following afternoon. Mr VB replied and said that he had received a report from [Expert A], attaching a copy. Some little time after that [Expert A] said that he was unable to take the matter on.

[Expert B]

[218] Mr VB engaged [Expert B], not only under circumstances of considerable urgency, but also after Mrs ZN's briefs of evidence were due to be filed and served. By then it was clear that none of the experts that Mr VB had approached either of his own volition or on Mrs ZN's instructions, were available or otherwise prepared to take the matter on.

Discussion

[219] I do not agree with [Counsel A's] submission that r 13.3 does not require consultation and instruction before experts are engaged.

[220] Because the engagement of experts will almost invariably involve those experts charging a fee, which a lawyer will then pass on to their client as a disbursement, I consider that this is in the category of a "significant decision in respect of the conduct of litigation" for which a client's instructions must be obtained and followed.

[221] Further, I am not satisfied that Mrs ZN left the engagement of experts entirely up to Mr VB's judgement and discretion, including that she did not require to be consulted about that.

[222] That appeared to be the thrust of [Counsel A's] submissions. She based this on an email exchange between Mr VB and Mrs ZN in August and September 2015, to do with the need for a [Technical] report.

[223] However, I do not consider that this exchange goes anywhere near Mrs ZN providing carte blanche instructions about the future engagement of experts.

[224] I would regard that sort of arrangement as being a material departure from the obligation in r 13.3, which may well be unenforceable as being inconsistent with the backbone of the Act which emphasises consumer protection; this being founded on the obvious knowledge imbalance between lawyer and client.

[225] As well, despite the pressures of time under which Mr VB was labouring between receiving the insurer's briefs of evidence and being required to file and serve Mrs ZN's evidence briefs, I do not regard that as falling into the type of exception referred to above at [202]. Those kinds of situations arise, in the true heat of the moment.

[226] Indeed, in his affidavit, Mr VB acknowledged that there were options open to him, which he elected not to take, preferring to be proactive.[32] In particular, I note that although he engaged [Expert B] on 31 March 2016, he did not inform Mrs ZN of this until 3 April 2016.

[227] I note that 31 March 2016 fell on a Thursday; 3 April 2016 fell on a Sunday. It is not clear to me why Mr VB did not, or could not, inform Mrs ZN on or before 31 March 2016 about the potential of engaging [Expert B].

[228] I do not suggest that this is prima facie evidence of a conduct breach by Mr VB. Clearly, the Committee has already found otherwise in his case.

[229] What, however, troubles me about the Committee's finding against Mr TP, is that it is inconsistent with its decision to take no further action against Mr VB, based on the same set of facts.

[230] On the one hand, the Committee took no further action against Mr VB, who had the day-to-day management of the file at this time[33] and was a senior lawyer (as I have

[32] Affidavit of Mr VB (sworn 3 June 2020) at [21] and following.
[33] In his affidavit, Mr VB noted that he had the responsibility for the day-to-day oversight of Mrs ZN's proceedings.

already described above at [14]) of some experience in this area; on the other hand Mr TP was found guilty of unsatisfactory conduct in relation to this issue of complaint.

[231] In my view the only principled basis for such an approach would be that Mr TP had failed in his obligation to properly supervise and manage Mr VB, as is required of a principal in a law firm pursuant to r 11.3.

[232] As I read [Counsel B's] submissions on behalf of Mrs ZN, he puts his argument on the basis that "Mr TP must take professional responsibility for Mr VB's conduct."

[233] However, that was not identified as an issue of complaint by the Committee and it did not form part of its reasoning. I am not prepared to entertain it in the context of a review application, because it is effectively a fresh ground of complaint.

[234] Moreover, Mr VB's conduct was found not to be wanting by the Committee. In that sense, there is no "conduct" for which Mr TP "must take professional responsibility."

[235] I can see no basis for making a conduct finding against Mr TP, in the circumstances. It follows that the Committee's orders that Mr TP either write-off these disbursements, or refund them to Mrs ZN if already paid by her, fall away.

Post-settlement conduct:

Notifying High Court proceedings had settled

[236] On this issue I have no hesitation in finding that Mr TP was wrong to have contacted the High Court and informed it that Mrs ZN's proceedings had been settled, and that the hearing could be vacated. His instructions from her were otherwise.

[237] Whatever Mr TP's views may have been about whether Mrs ZN had given instructions to settle shortly before 6 pm on Sunday 24 April 2016, and whether that meant there was a concluded settlement, it is abundantly clear that Mrs ZN was emphatically resiling from that overnight on Sunday, 24 April 2016 and the following morning, Monday, 25 April 2016.

[238] It simply does not matter what Mr TP's views were about this. A client is entitled to change their mind, despite emphatic, robust advice from a lawyer to the contrary. And of course a lawyer is obliged to carry those instructions out, unless they involve some breach of duty that the lawyer has, particularly to the court.

[239] It may well indeed be the case that Mrs ZN gave informed instructions to accept the settlement offer, but then instantly regretted it. She is entitled to do so. Or, it may be the case that she received little guidance about whether to accept the insurer's settlement offer and was placed under some duress to make a prompt decision (in the space of less than 30 minutes).

[240] And it may also be the case that, as a matter of law, there is as between Mrs ZN and her insurer a binding contract of settlement, consummated when Mr TP notified her acceptance to the insurer's lawyers by text message at 6 pm on Sunday, 24 April 2016.

[241] The process of review before a Review Officer does not include jurisdiction to make findings about questions of contract law.

[242] Mrs ZN had sent the following messages to Mr TP and/or Mr VB after 6 pm on Sunday, 24 April 2016:

> I have decided NOT to accept [the insurer's] deal. … I do not [appreciate] that you as my lawyers are putting me under time pressure like you have. If [the insurer] does not accept the deal I am offering I am [fully] prepared to go to court … Don't ring me again until tomorrow
>
> ..
>
> You have ignored my written instructions … The deal [the insurer is] proposing is [morally] and ethically wrong. I will not accept it.
>
> …
>
> [Mr VB], read [your] emails. I informed [you] NOT [to] accept the deal. I will not sign it.
>
> …
>
> I will not sign the deal [the insurer] is offering me. When [Mr VB] rang yesterday, I told him I needed to sleep on the proposed deal. He gave me 30 minutes. I consider that bullying. I believe I have a good case against [the insurer] and am happy to go to court tomorrow to plead it [in front] of an independent judge.

[243] Mr TP surely recognised the shift and its ethical consequences, because he sent an email to Mrs ZN at 11.40 am on Monday 25 April 2016, in the following terms:

> Yesterday you said you accepted it.
>
> Based on what you said we then communicated acceptance to [the insurer].
>
> The deal is done.

> If you now want to say that you did not communicate acceptance to [Mr VB] then we cannot act for you.

[244] It would seem to be the case that Mrs ZN did not respond to that email, or to subsequent attempts by Mr TP to contact her. Some ten hours later he informed the High Court that the matter had been settled.

[245] Mr TP had express instructions from Mrs ZN not to do so.

[246] The ethical and professional position in which Mr TP found himself, having learnt of Mrs ZN's change of heart (and there is no doubt that he knew about it), was unusual and unfortunate but in my view not particularly difficult.

[247] Mr TP was faced with instructions from a client to proceed with a trial in circumstances where he had earlier told the insurer that there had been a settlement. It is clear from this, that he could not continue to act for Mrs ZN as he was potentially a witness to the issue that had emerged: was there a concluded settlement?

[248] As well, Mr TP had a duty to tell the court that the hearing was compromised and that he could no longer act for Mrs ZN.

[88] It bears repeating the Committee's prescription for dealing with the situation in which Mr TP found himself.[34] Mr TP should:

(a) have contacted Mrs ZN directly to confirm her instructions;

(b) then inform the insurer, if instructed to do so, that the offer had been rejected and that Mrs ZN did not accept that settlement terms had been agreed.

If the insurer asserted that settlement had been agreed, Mr TP would then be expected to:

(c) apply to the court for an order granting leave to withdraw and seek an adjournment of the trial (thereby terminating the retainer); and

(d) give Mrs ZN reasonable assistance to find another lawyer (in accordance with r 4.2.4 of the Rules).

[249] Ms Cameron acknowledged that the Committee's prescription for dealing with the situation was correct, but she described it as "a counsel of perfection" which was

[34] Standards Committee determination at [76].

simply not a practicable option for Mr TP in the circumstances, which included an imminent High Court trial.

[250] I do not agree. By 11.40 am on the day before the trial was scheduled to commence, Mr TP could be in no doubt about Mrs ZN's instructions. His email at that time recognised this and the potential ethical consequence. He was right to endeavour to contact Mrs ZN after this, but by at least early afternoon he could reasonably have come to the conclusion that Mrs ZN was resolute in the position that she had outlined over the preceding 18 hours.

[251] Self-evidently if the insurer was going to argue that there had been offer, acceptance and consideration as a result of Mr TP's text message at 6 pm on Sunday, 24 April 2016, then that gives rise to an entirely different species of litigation: the enforcement of a concluded contract.

[252] As a preliminary point, I would have expected Mr TP to at least raise this issue with the insurer's lawyers to ascertain their position. That being said, I think that there is little doubt that the insurer's position would have been that they had a concluded settlement with Mrs ZN.

[253] Clearly by then the issue was not whether Mr TP should inform the court that the insurance litigation had been settled. He could not do so, because that would be disclosing his instructions.

[254] The issue was whether, because of Mrs ZN's change of mind, there was an enforceable settlement agreement. The two are quite distinct, and the latter had overtaken the former as the sticking-point.

[255] Mr TP had a duty to the court to facilitate the administration of justice.[35] This was Mr TP's overriding duty.[36]

[256] In those circumstances it should not have been difficult at all for Mr TP to recognise that he could do nothing further as Mrs ZN's lawyer in relation to the progress of her proceedings.

[257] In the circumstances in which Mr TP found himself, his overriding duty to the court could only be discharged by informing it that it was not possible for the hearing to

[35] Section 4(a) of the Act and r 2 of the Rules.
[36] Rule 2.1 of the Rules.

proceed on Tuesday, 26 April 2016. At the very most, all he could say was that an issue had arisen as to whether the proceedings were settled between the parties.

[258] Doubtless that would have caused considerable inconvenience to all parties involved, but in the face of a plaintiff who wished to proceed and a defendant maintaining that as a matter of law the issue had been settled, the court would have had little choice but to adjourn the proceedings.

[259] I agree with the Committee's conclusions about this issue of complaint.

Settlement agreement

[260] Having held above that Mr TP had been explicitly instructed not to proceed further with any settlement; indeed arguably his instructions were that Mrs ZN had not sufficiently agreed to settle the proceedings, Mr TP could go no further along that route, at all.

[261] The only pathway available to Mr TP was that prescribed by the Committee and endorsed by me. It follows that Mr TP could not liaise with the insurer's lawyers to discuss the settlement agreement.

[262] It is not necessary for me to make a finding as to whether those discussions, between about 26 April 2016 and 2 May 2016, were ongoing negotiations or merely formalising already agreed terms as Mr TP submits.

[263] The steps that Mr TP took between those dates were taken without Mrs ZN's instructions. Indeed, they were contrary to her explicit instructions.

[264] I agree with the Committee that this was a breach by Mr TP of r 13.3 of the Rules: specifically, that he "must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation." I further agree that this was unsatisfactory conduct, contrary to s 12(c) of the Act.

Memorandum

[265] On Mr TP's behalf, Ms Cameron's short point was that Mr TP's 9 June 2016 memorandum did not include any confidential information about Mrs ZN. To the extent that it may have, Mr TP had been directed by the court to disclose it.

[266] Ms Cameron said that the situation arose because the lawyer that Mrs ZN had instructed to act for her during May 2016, had not taken the appropriate steps of putting

himself “on the record” in the proceedings. Mr TP’s reasonable expectation was that this lawyer would have done so.

[267] It is clear from the Associate Judge’s Minute dated 7 June 2016, that the court was taken by surprise by Mrs ZN’s telephone call on the same day advising that the proceedings had not, in her view, been settled.

[268] The court’s position was, following Mr TP’s 25 April 2016 email to it, that the proceedings had been settled. All it was anticipating was a periodic review of the progress of settlement being implemented.

[269] Very clearly, Mr TP was obliged to keep confidential his instructions from Mrs ZN. Those instructions included that the proceedings could be settled, followed by instructions that she did not recognise the settlement and had been pressured into it.

[270] Mr TP’s memorandum discloses his instructions. That is the only meaning to be drawn from the following sentences:

(a) “Mrs ZN is wrong to say that she did not agree to settle this proceeding”;

(b) “[Mrs ZN] instructed my firm to accept [the insurer’s] offer”;

(c) “Mrs ZN then apparently wanted to reconsider and refused to cooperate with finalising the settlement. She did not respond to phone calls and emails.”

[271] I consider this to be a breach by Mr TP of r 8 of the Rules.

[272] The next question is whether Mr TP’s disclosure is one that is permissible under the Rules as being “required” pursuant to r 8.2(d) and 8.3 of the Rules.

[273] I do not agree with [Counsel A’s]submission that the Associate Judge in his Minute in directing Mr TP to “explain the position as he sees it”, was requiring him to disclose Mrs ZN’s confidential information.

[274] If a court was to require a lawyer to do so, I would expect that to be expressed in explicit terms together with a right for the lawyer’s client (or ex-client) to make submissions on the point.

[275] Moreover, I do not agree with Ms Cameron's submission that the Associate Judge was asking Mr TP "to explain why Mrs ZN was saying there was no settlement."[37] the court's question was simple: Mr TP was to explain "the position as he sees it."

[276] The "position" was, very simply, that there was an issue as to whether the proceedings had been settled. That is all that Mr TP could tell the court.

[277] Ms Cameron submitted that Mr TP was in "a difficult professional position." I do not agree with that, for the reasons I have outlined in my discussion about Mr TP contacting the court on 25 April 2016 advising that the proceedings had been settled.

[278] Nevertheless, even if Mr TP considered that he was in a difficult professional position, then in my view that cried out for a cautious approach, rather than one which involved him disclosing his instructions to the court in circumstances when he had not been directed to do so.

Conclusion

[279] In summary, I find Mr TP guilty of unsatisfactory conduct in the following respects:

(a) Mr TP's information about fees for Mrs ZN did not adequately describe or explain the basis upon which his fees would be charged.

(b) In contacting the High Court to inform it that Mrs ZN's proceedings had been settled and the hearing could be vacated, Mr TP acted contrary to Mrs ZN's instructions.

(c) In continuing to discuss settlement with the insurer's lawyers from 26 April 2016 (whether negotiation or confirmation of terms), Mr TP acted contrary to Mrs ZN's instructions.

(d) In filing a memorandum with the High Court on 9 June 2016, Mr TP breached his duty of confidentiality to Mrs ZN by referring to her instructions to him about settlement.

Penalty

[280] I now turn to consider the question of penalty.

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[37] [Counsel A]'s submissions (3 June 2020) at [17.7].

[281] When the Committee imposed its penalty on Mr TP, it imposed a global fine of $8,000 for all of the breaches that it had found. It did not differentiate between those breaches as to which was the most serious.

[282] I have disagreed with the Committee in relation to one of its findings: I do not consider that any conduct issues arise for Mr TP in relation to Mr VB having engaged experts contrary to and without Mrs ZN's instructions.

[283] The Committee's finding that Mr TP did not comply with his client care requirements and that the totality of those breaches amounted to unsatisfactory conduct includes matters upon which I have disagreed with the Committee.

[284] In particular, I do not agree the with the Committee's conclusion that Mr TP had a conditional fee agreement with Mrs ZN. As well, although I agree that Mr TP did not provide his client care information to Mrs ZN "in advance", I do not consider that this breach warrants a disciplinary finding.

[285] In short, the findings of unsatisfactory conduct that I have made are fewer in number and narrower in scope than those of the Committee.

[286] A fine of $8,000 is not called for in relation to breaches that I have upheld.

[287] Nevertheless, I regard Mr TP's conduct in contacting the High Court to say that the proceedings had been settled, and continuing discussions with the insurer's lawyers after that, to be serious and without any reasonable basis whatsoever.

[288] I have set out my reasons above but would emphasise that Mrs ZN could not have been clearer about her position. Whether she was right or wrong was not something Mr TP could trump with his own views. As his client, Mrs ZN had the last say and this triggered the professional pathway that Mr TP should have taken. As indicated, I consider that Mr TP was well alive to this.

[289] As well, I regard Mr TP's 9 June 2016 memorandum as being petulant rather than measured. In the process, Mr TP disclosed Mrs ZN's confidential information: namely her instructions to him.

[290] In my view the totality of the findings that I have made against Mr TP, call for the imposition of a fine of $4,500.

Committee's costs

[291] The Committee ordered Mr TP to pay the New Zealand Law Society the sum of $3,000 by way of costs associated with its inquiry and hearing.

[292] The Committee was confronted with a considerable body of material, across a very wide array of subjects.

[293] The Committee is to be commended for carefully and succinctly identifying the principal conduct issues that the Mrs ZN's complaint raised. The fact that I have come to a different conclusion from the Committee on some of those issues, is no reflection on the careful attention that it gave to the complaint and to Mr TP's responses.

[294] In the circumstances I do not intend to interfere with its costs order.

Review costs

[295] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr TP is ordered to pay costs in the sum of $1,200 to the New Zealand Law Society by 4 pm on Friday, 23 October 2020, pursuant to s 210(1) of the Act.

Enforcement of costs order

[296] Pursuant to s 215 of the Act, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Decision

[297] Pursuant to s 209 of the Lawyers and Conveyancers Act 2006 I direct the Standards Committee to reconsider and determine the following (being issues that formed part of Mrs ZN's complaint):

(a) Whether there are any issues of conflict in relation to Mr TP's representation of Mrs ZN, and his relationship with [Firm B]. In particular, whether rr 5.4 and/or 6.1 of the Rules are engaged. This is issue 4(a) in Mrs ZN's counsel's letter to this Office dated 5 December 2017.

(b) Whether Mr TP complied with his obligations under rr 7.1 and/or 13.3 of the Rules when advising Mrs ZN about issuing proceedings against her insurer, prior to July 2014. This is issue 4(b) in Mrs ZN's counsel's letter to this Office dated 5 December 2017.

[298] I direct the Case Manager to attach a copy of paragraphs 4(a) and 4(b) from Mrs ZN's counsel's letter to this Office dated 5 December 2017, to this decision when it is released to the parties. No other part of that letter may be disclosed.

[299] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is:

(a) Confirmed as to the finding that the fee information that Mr TP provided to Mrs ZN was inadequate but only to the extent that this was a breach of r 3.4(a) of the Rules and was unsatisfactory conduct pursuant to s 12(c) of the Act as described in [199] above;

(b) Reversed as to the finding that Mr TP did not obtain authority from Mrs ZN to incur expert witness disbursements;

(c) Confirmed as to the finding that Mr TP's "post-settlement conduct" following Sunday, 24 April 2016 breached rr 8, 8.1 and 13.3 of the Rules and was unsatisfactory conduct;

(d) Modified as to the penalty in terms of [280]–[290] above.

DATED this 14th day of September 2020

R Hesketh
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 TP as the applicant
[Counsel A] as counsel for the applicant
Mrs ZN as the respondent
[Counsel B] as counsel for the respondent
National Standards Committee
New Zealand Law Society