LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 24

Ref: LCRO 194/2020

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

DECISION

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

Introduction

At the relevant time, Mr WQ, and Ms QZ, both lawyers, were sole director, and senior associate respectively of [Law Firm A], an incorporated law firm (the firm), which acted for [Company A] (the company), on the purchase of a dairy farm property and livestock. Mr VR and Mrs VR were the shareholders of the company.[1]

Mr VR's complaint was about the firm's fee for acting on the purchase. In particular, about the inclusion in the fee of a percentage charge based on the purchase price paid by the company for the farm property.

The [Area] Standards Committee [X] (the Committee), which heard the complaint, made a finding of unsatisfactory against Mr WQ, and Ms QZ for failing to disclose to

[1] My reference to Mr VR includes him, Mrs VR, and the company.

Mr VR in the firm's letter of engagement the firm's intention to include that percentage charge in the fee for acting on the purchase. The Committee ordered Mr WQ and Ms QZ to reduce the fee by the amount of the percentage charge and refund that money to the company.

As detailed in my later analysis, during the first half of 2019 Mr VR discussed and reached an agreement with his father, and his stepmother, who as trustees of a trust (the vendor) owned a dairy farm property, on terms for the purchase of the farm by the company.

To assist with funding the purchase price of just under $3.026 million plus GST the company was to obtain a bank loan to be secured by first mortgage against the farm property, and the vendor would lend the company $1 million to be recorded in a deed of acknowledgement of debt and secured by a second mortgage and a general security agreement over the company.

The purchase agreement provided for two leases of adjacent land owned by the vendor for grazing and associated cropping, and a separate purchase agreement for livestock.

On 1 July 2019, having received from Mr VR a draft of the purchase agreement prepared by the vendor's lawyer, Ms QZ opened a file for the purchase.

The following day the vendor's lawyer sent to Ms QZ first, the "final versions" of the purchase agreement, and the two leases, and later the deed of acknowledgement of debt.

Ms QZ sent to Mr VR on 3 July the firm's letter of engagement accompanied by client care and service information, and the firm's standard terms of engagement.

On 8 July the vendor's lawyer sent to Ms QZ (a) as requested by Mr VR, the vendor trustees' memorandum of wishes which concerned repayment of the vendor loan of $1 million, and (b) the livestock agreement. Ms QZ met with Mr and Mrs VR that afternoon to discuss those documents, and the leases, and the following day provided her comments to the vendor's lawyer.

By 15 July both parties had signed purchase documents. The following day, at the bank's request, the vendor's lawyer agreed to extend the settlement date to 26 July.

On 17 July, with the bank finance condition satisfied, the bank made arrangements for the deposit to be paid, and on 19 July forwarded the bank loan documents to Ms QZ.

On 23 July Ms QZ sent her solicitors certificate, and related documents concerning the bank loan to the bank.

Late evening on 24 July the vendor's lawyer sent his settlement statements to Ms QZ's assistant, and the following day delivered the originals together with his settlement requirements. Settlement by e-dealing took place on 26 July.

Meanwhile, on 24 July the firm had issued its fee invoice, signed by Ms QZ for its fee of $12,603.05 plus GST and disbursements. This was sent to the company (by email) on 25 July to Mr VR together with the firm's trust statement. The fee included a charge of $6,051.05 plus GST representing 0.2 per cent of the farm property purchase price.

Having queried the fee on 25 July, and reviewed a fee breakdown received from Mr WQ on 27 July, Mr VR told Mr WQ that day he "wasn't aware of the 0.2% charge on farm sales purchases". Following further email communications exchanged about Mr VR's concerns with the fee, on 22 August another lawyer instructed by Mr VR informed Mr WQ that Mr WQ's offer to reduce the fee was not accepted.

Complaint

Mr VR lodged a complaint with the Lawyers Complaints Service on 4 September 2019.

(1) Basis of charging

He claimed by not disclosing the firm's "0.2%" of the purchase price method of fee calculation in the firm's letter of engagement Mr WQ and Ms QZ had (a) "by omission" misled him, and (b) without authorisation deducted that charge as part of the firm's fee.

He said had the firm disclosed this method of fee determination to him at the outset he "would have immediately sought other quotes" for the firm's legal work, and would not have agreed to contribute so much towards the vendor's legal fees.

(2) Fair and reasonable fee

Mr VR said realising, upon receipt of the firm's 24 July 2019 invoice, that the firm's fee was considerably more than the firm's hours recorded multiplied by the authors' hourly charge out rate of $390 plus GST, he queried the fee and requested a fee breakdown from Mr WQ.

He explained once he knew the fee included a charge of 0.2 per cent of the purchase price he raised his concerns with Ms QZ on her return from leave. He said Ms QZ

acknowledged she had not informed him that the percentage charge would be included in the fee and proposed a refund of that charge.

He said Mr WQ subsequently, on 13 August 2019, offered to reduce the fee by $1,500, and to complete [Mr and Mrs VR's] wills and powers of attorney at no cost. He said another lawyer acting on his behalf subsequently asked Mr WQ to refund part of the fee but Mr WQ declined and would not negotiate further.

Response

I refer to Mr WQ's, and Ms QZ's response in my later analysis.

In essence, their position was that (a) the firm's method of including a percentage charge on the overall fee was an "internal method" of the setting of fee, "widely used" in the locality for similar transactions, which took account of the fee factors in r 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules); and (b) although it would have been "preferable to discuss" that "method" with Mr VR at the outset, the firm now did so with clients.

Standards Committee decision

In its decision delivered on 4 September 2020 the Committee determined, pursuant to s 152(2)(b)(i) of the Lawyers and Conveyancers Act 2006 (the Act), that by failing to provide the firm's basis of charging fees before commencing to act for Mr VR on the purchase Mr WQ and Ms QZ had contravened r 3.4(a) of the Rules.

The Committee ordered Mr WQ and Ms QZ to reduce the fee charged by $6,051.05 plus GST, the amount of the percentage charge, and refund that money to Mr VR.

(1) Fair and reasonable fee

Having referred to those fee factors in r 9.1 which it considered applicable, the Committee decided the firm's fee was "fair and reasonable for the work completed" albeit "at the higher end of the range".

(a) Time and labour expended - r 9.1(a)

The Committee noted that the firm's letter of engagement (a) stated Ms QZ, then a senior associate with the firm, would be responsible for the legal work which would be billed at the hourly charge out rate of $390 plus GST, plus disbursements, and (b) summarised "the reasonable fee factors in r 9.1" to be taken into account when determining the fee.

In the Committee's view Mr WQ's, and Ms QZ's time recorded of 16.8 hours "was consistent with the time … expected" on the matter and was "reasonable". This was despite Mr WQ's position, disputed by Mr VR, that the absence of a real estate agent "increased legal costs".[2]

(b) Skill, specialised knowledge, and responsibility - r 9.1(b)

In the Committee's view Mr WQ's, and Ms QZ's experience in property law meant they were "well placed to advise" Mr VR on the purchase.

(c) Urgency - r 9.1(d)

The Committee accepted Mr WQ's and Ms QZ's submission that the settlement date, "just 14 days after they were instructed", necessitated "some urgent attendances" in respect of which an "uplift" was warranted.

(d) Degree of risk - r 9.1(e)

Noting the "considerable risks" for lawyers acting on such farming transactions, the Committee referred to (a) "the [large] sums of money involved", (b) "the settlement process not always [being] straightforward", and (c) the fact that Mr VR's purchase was a family transaction in respect of which his father's memorandum of wishes was a consideration.

(e) Complexity - r 9.1(f)

The Committee considered Mr VR's purchase was a "moderately complex transaction".

(f) Fee customarily charged in the market and locality - r 9.1(m)

The Committee stated it was satisfied the firm's fee "would normally be charged for such work" in respect of which "it was not uncommon" for lawyers "to charge a premium on similar transactions", and was, therefore "consistent with market rates".

(2) Nature of the retainer - rr 7.1, 1.2

By a "narrow" margin, the Committee said it was "satisfied" Mr WQ and Ms QZ (a) "ensured" Mr VR understood "the basic characteristics" of the retainer including the fee charged would be "consistent with" the r 9.1 fee factors, and (b) "updated" Mr VR

[2] As noted later, Mr VR disagrees with Mr WQ because "all major details of the transaction" had been agreed, and a draft purchase agreement prepared by the vendor's lawyer before [Mr VR] instructed the firm.

about “progress” of the transaction. The Committee noted Mr VR was “aware of the steps being taken” on his purchase.

(3) Basis of charging - r 3.4(a)

Having noted Mr WQ and Ms QZ acknowledged they had not informed Mr VR about the “percentage charge” until after the firm issued its 24 July 2019 invoice, the Committee concluded that by “fail[ing] to disclose” that information they had contravened r 3.4(a) of the Rules.[3]

The Committee did not accept Mr WQ’s and Ms QZ’s submission that because the percentage charge was an “internal” method of calculating the fee that “fairly and reasonably takes into account” the r 9.1 fee factors for “a farming transaction” there was no need for them to inform Mr VR of the firm’s intention to include that charge in the fee.

The Committee explained the words “the basis on which the fees will be charged” in r 3.4(a) required Mr WQ and Ms QZ to inform Mr VR, “prior to commencing work” on the transaction, that the percentage charge which concerned the r 9.1 fee factors would “ma[k]e up a significant portion” of the fee.

Application for review

Mr WQ, and Ms QZ filed an application for review on 16 October 2020 seeking a reversal of (a) the Committee’s decision they contravened r 3.4(a), and (b) the Committee’s order the firm’s fee be reduced by an amount equivalent to the percentage charge, and refunded to Mr VR.

(1) Fair and reasonable fee

Mr WQ and Ms QZ submit that having found that the firm’s fee was fair and reasonable, the Committee’s order that the fee be reduced by the percentage charge, and refunded to Mr VR means that the remaining fee is “significantly less than fair and reasonable”.

They contend this “creates a windfall” for Mr VR which is “punitive” on them, “inappropriate”, and “essentially…a $6,000 fine”. They say there is “no evidence of bad faith, or an attempt to mislead” by them to justify that punishment.

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[3] Ms QZ, email to Mr VR (6 August 2019) - Ms QZ acknowledged she did not disclose the percentage charge, and said she would recommend to Mr WQ that the firm reimburse that proportion of the fee to Mr VR.

(2) Basis of charging

Mr WQ and Ms QZ say that the firm's letter of engagement complied with r 3.4 by disclosing "the basis [o]n which fees will be charged". They say the letter of engagement "clearly identifie[d]" their fee would be calculated "on a range of factors, not just time".

They repeat that the firm's "0.2% charge" at that time was the firm's "internal" method of "determining a fair and reasonable fee" by taking into account the r 9.1 fee factors.

They say they did not "attempt or intend to mislead" Mr VR, and "promptly demonstrated [their] willingness to improve" the firm's letter of engagement by explaining this method of determining a fee when Mr VR queried the firm's fee.

They accept that "in hindsight" it may have been "better practice to explain" this method of charging in their letter of engagement but reject their failure to do so constituted a contravention of the rule.

They explain although they do not have actual knowledge of other law firms "specifically identify[ing]" such methods of fee calculation in terms of engagement, their "genuine understanding and belief" is this practice is "industrywide and commonplace" with "provincial legal firms".

Response

In his response lodged on 27 October 2020, Mr VR submits that Mr WQ and Ms QZ have not produced any new evidence or argument in support of the Committee having erred in its decision. He asks that the review application be dismissed, and the Committee's orders upheld.

(1) Basis of charging - r 3.4(a)

Mr VR says he agrees with the Committee's decision that by not disclosing a percentage charge would be included in the firm's fee Mr WQ and Ms QZ had contravened this rule as well as the relevant provisions of the Fair Trading Act 1986.

He says Mr WQ's and Ms QZ's statement they did not know of other law firms that "specifically identify" such a charge in their letters of engagement indicates "a wider industry problem of inadequate disclosure". For that reason, and to make lawyers aware of their professional duties, Mr VR requests publication of the decision.

(2) Fair and reasonable fee - rr 9, 9.1

Mr VR submits that by stating the firm's fee was "at the higher end" of fees considered fair and reasonable, the Committee, in effect, found there is "no such industrywide custom" of a percentage charge.

(3) Committee's orders

In his submission because the firm did not inform him of the percentage charge in either the letter of engagement, or invoice, it is disingenuous of Mr WQ and Ms QZ to describe the Committee's refund order as punitive on them, and a windfall to him.

He says on 6 August 2019 Ms QZ acknowledged to him the firm had not previously told him about the percentage charge, and would recommend to Mr WQ that charge be refunded; and on 13 August 2019 Mr WQ told him [Mr WQ] would comply with any order made by Law Society if it determined the fees "were excessive".[4]

Hearing

The parties attended a review hearing in Auckland by audio-visual link (AVL) on 1 March 2022.

Nature and scope of review

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

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

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[4] Ms QZ, email to Mr VR (6 August 2019); Mr WQ, letter to Mr VR (13 August 2019).
[5] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

Issues

The issues I have identified for consideration on this review are:

(a) Did Mr WQ, and Ms QZ in the firm's letter of engagement, or in any other communication, to the company around the time the company instructed the firm to act on the purchase of the farm property, inform the company that the firm's fee would include a charge calculated as a percentage of the purchase price of the farm property?

(b) For the purposes of r 9, what was a fair and reasonable fee for Mr WQ and Ms QZ to charge the company for acting on that matter having regard to the company's, and the firm's interests, and the fee factors in r 9.1?

(c) Relatedly, did the fee factors in r 9.1 entitle Mr WQ and Ms QZ to include such a percentage charge in their fee?

Analysis

(1) Basis of charging - letter of engagement - issue (a)

(a) Overview

Mr VR says he agrees with the Committee's decision that Mr WQ and Ms QZ contravened r 3.4(a) by not disclosing to him in the firm's letter of engagement that a

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

charge calculated as a percentage of the purchase price would be included in the firm's fee.[7]

For their reasons which I refer to below, Mr WQ and Ms QZ do not agree with the Committee's decision.

(b) Context

The following summary of events provides context for discussion of all issues.[8]

As noted earlier, during the first half of 2019 Mr VR discussed and reached an agreement with his father, and his stepmother, the trustees of a trust which owned a dairy farm property, on terms for the purchase of the farm by Mr and Mrs VR's company.

On 1 July 2019, Mr VR sent to Ms QZ a draft sale and purchase agreement prepared by the vendor's lawyer explaining the only expected change was a reduction in the number of cows being purchased. Ms QZ opened a file for the purchase in the company's name that day.

The following day, 2 July, the vendor's lawyer sent to Ms QZ the "final versions" of the farm purchase agreement, and the two leases. The purchase price of just under $3.026 million plus GST was payable as to (a) a deposit of $100,000, and (b) the balance, which included a vendor loan to be secured by a second mortgage over the farm property, on settlement. There were two conditions. First, the company obtaining a bank loan, and secondly, the leases being entered into before settlement. Later that day the vendor's lawyer sent Ms QZ the deed of acknowledgement of debt concerning the vendor loan.

The purchase of the livestock was to be documented in a separate agreement.

On 3 July Ms QZ sent to Mr VR the firm's letter of engagement accompanied by client care and service information, and the firm's standard terms of engagement. Also that day Ms QZ exchanged emails with the vendor's lawyer concerning the priority required by the bank for the bank loan.

On 8 July the vendor's lawyer sent to Ms QZ (a) at Mr VR's request in respect of repayment of the vendor loan, the vendor trustees' memorandum of wishes, and (b) the

[7] Mr VR also says Mr WQ and Ms QZ likely contravened corresponding provisions of the Fair Trading Act 1986.
[8] Unless otherwise stated, all communications were by email.

livestock agreement. That afternoon Ms QZ met with Mr and Mrs VR to discuss those documents, and the leases, and the following day provided her comments to the vendor's lawyer.

By 15 July the parties had signed both the farm purchase, and livestock agreements. The following day the vendor's lawyer agreed, at the bank's request, to postpone settlement to 26 July but without altering the lease commencement date of 22 July.

The finance condition was satisfied on 17 July. That day the bank arranged for the deposit to be paid, and on 19 July forwarded loan documents and instructions to Ms QZ.

On 23 July Ms QZ requested from the vendor's lawyer items concerning the purchase including the vendor's settlement statement, a copy of the signed memorandum of wishes, and confirmation of the reduction of the number of cows being purchased.

Later that day Ms QZ (a) sent to, and again requested from the vendor's lawyer the bank deed of priority for signature by the vendor, and the settlement statement respectively, and (b) provided her solicitor's certificate and related documents to the bank to uplift the loan for settlement on Friday, 26 July.[9]

Late evening on 24 July the vendor's lawyer sent his settlement statements to Ms QZ's assistant. The originals, accompanied by a letter containing his settlement requirements, were delivered the following day. In Ms QZ's absence, Mr WQ arranged, and attended to settlement by e-dealing with the vendor's lawyer on 26 July.

Meanwhile, on 24 July the firm had issued its fee invoice signed by Ms QZ, for its fee of $12,603.05 plus GST and disbursements, sent, with the firm's trust statement, to Mr VR on 25 July.

In reply that day Mr VR queried the makeup of the firm's fee of $12,603.05 plus GST, and in Ms QZ's absence followed-up the next day with Mr WQ.

On Saturday 27 July, Mr WQ explained (by telephone) to Mr VR how the fee was made up, and sent a fee breakdown to Mr VR. Later that day Mr VR objected to the fee, stating the "0.2% charge on the farm purchase value" had not previously been notified to him, and was "totally unexpected".

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[9] Mr AA (the vendor's lawyer), email to Ms BB (Ms QZ's assistant), cc Ms QZ (24 July 2019, 9:15 pm): it appears Ms QZ was absent from her office from 25 July until 5 August during which time Mr WQ assumed responsibility for the matter.

(c) Professional rules

Mr VR's complaint is that until he received Mr WQ's fee breakdown he did not know the fee included a charge calculated as a percentage of the purchase price. The first question, therefore, is whether the firm's letter of engagement disclosed the firm's intention to make that charge.

A "retainer" is the expression for the contract or agreement for the provision of legal services by a lawyer to his or her client defined in r 1.2 of the Rules as:

> …an agreement under which a lawyer undertakes to provide or does provide legal services to a client, whether that agreement is express or implied, whether recorded in writing or not, and whether payment is to be made by the client or not.

An important term of any retainer concerns the fees the lawyer will charge in respect of which lawyers are bound by certain obligations and duties.

At the commencement of a retainer, before a lawyer, who is not a barrister sole, commences work for the client, he or she "must, in advance, provide in writing to a client information", specified in r 3.4, "on the principal aspects of client service".[10]

In the context of Mr VR's complaint, the information required by r 3.4(a) is "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 (subject to any requirement of regulation 9 or 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008)".[11]

Concerning the phrase "in advance", also contained in section 94(j) of the Act, the footnote to r 3.4 recommends that lawyers "provide the information set out in rule 3.4 prior to commencing work under a retainer".

In addition to those requirements, r 3.5 requires that a lawyer "must, prior to undertaking significant work under a retainer, provide in writing to the client"

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[10] Rule 3.4 of the Rules. From 1 July 2015, r 3.4A contains the corresponding requirements applicable to barristers sole: Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Amendment Rules 2015.

[11] The other information required by r 3.4 is (b) the lawyer's "professional indemnity arrangements"; (c) the coverage provided by the Lawyers' Fidelity Fund and if the client's funds are to be held or utilised for purposes not covered by [that fund], the fact that this is the case; and (d) the lawyer's "procedures …for the handling of complaints by clients…".

information including client care and service information, and the names and status of the persons who will carry out and be responsible for the work.[12]

In order to comply with the requirements of both rules it appears "sufficient if the lawyer provides the relevant information as soon as possible". In saying that, it is acknowledged that "some minor steps will have already been taken" concerning the matter, but it is "expected that in most cases" the provision of information required by both rules "will be provided together".[13]

In practice, to ensure compliance, lawyers provide this information to their clients ahead of work commencing on a retainer usually by a letter of engagement, information for clients and standard terms of engagement documents known collectively as "the letter of engagement" sent to clients electronically.[14]

(d) Parties' positions

Mr VR

Mr VR says neither the firm's letter of engagement, information for clients, and terms of engagement, nor the firm's 24 July 2019 invoice, mentioned a "charge of 0.2% of the farm purchase price".

Referring to r 3.4, and to the Committee having identified "a potential breach" of r 9, Mr VR says it is a "hypothetical exercise" to "cost revise the fairness" of a percentage "premium that was never disclosed". He says "ha[ving] no [prior] knowledge" it was not fair to charge him that fee, and by not "hav[ing] been notified …up front" of the "premium" he was "denied the opportunity" to seek "comparative competitive quotes from other lawyers".

He says Mr WQ's statement [Mr VR] "did not initiate any discussion or query regarding [the firm's] fees", or ask for "an estimate of [the firm's] likely costs" is an "admission" Mr WQ did not, as required by r 7.1, take "reasonable steps to ensure [Mr VR] underst[ood] the nature of the retainer".

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[12] Rule 3.5(a) to (c). Rule 3.5A contains the corresponding requirements applicable to barristers sole.
[13] Duncan Webb "*Engagement Letters*" (December 2008), Ministry of Justice website, LCRO section.
[14] *AJ v BJ* LCRO 258/2011 (December 2011); for specimens of these documents see New Zealand Law Society templates available on the NZLS website, "For Lawyers", "Regulatory requirements"; for their mode of communication see rr 1.6, 1.7 of the Rules.

At the hearing Mr VR said upon receipt he “carefully” read, and relied on the letter of engagement from which he said “any layman would take … on face value” that the basis of charging was by “hourly rate”. He said he was not aware, at that time, of either the fee factors in r 9.1, or the 0.2% charge.

Therefore, he said upon receipt of the firm’s fee invoice from Ms QZ on 24 July 2019, the day before settlement, he was in “disbelief and shock how the fee was determined”. He said he “fe[lt] the fee was not right”, and asked himself “what mistakes and errors” the firm had made.

Mr VR says because he was “under the impression” the letter of engagement contained “all the information necessary to calculate” the firm’s fees, he had no questions about the firm’s charges at that time, but would not have instructed the firm had he known the fee would include a percentage charge.

He says it was “not a reasonable expectation” he would have known about “any industry methodologies or Law Society practices” unless “expressly told” by Mr WQ.

Mr VR further explains that having subsequently made enquiries of other lawyers he now knows the inclusion of the “0.2% premium” was “at [the firm’s] discretion”, and “not necessarily applied over the total farm value”; or “not applied at all” on “simple” purchases such as those on which the firm had previously acted for him.

In his view the statement in the firm’s letter of engagement that “fees are based on a range of factors, not just time” is “so open-ended” as to be “meaningless”, and the fact the percentage charge represents “about 50%” of the fee renders the letter of engagement “a useless document for determining likely costs”.

In further support of his position Mr VR refers to (a) Ms QZ’s 6 August 2019 email to him which contained (i) her acknowledgement that the percentage charge had not previously been disclosed to him, and her view a refund of that charge would be fair, and (ii) her request for his bank account details; and (b) to Mr WQ’s response to his complaint “it would be better practice to discuss how fees are calculated with farm sale and purchase clients”.[15]

Referring to Ms QZ's “detailed and true account” of her legal services contained in her submissions to the Committee, Mr VR says Ms QZ “offer[ed] no defence” to his complaint” about the “unauthorised deduction of a 0.2%... [fee] premium”. He says it

[15] Mr WQ’s letter to LCS (20 December 2019).

was evident from Ms QZ's submissions she had "sufficient information" about the purchase to inform him "of any premium" the firm intended to charge.[16]

Mr WQ, Ms QZ

Mr WQ's and Ms QZ's responses to Mr VR's complaint, their submissions to the Committee, and their application for review were made by Mr WQ.[17]

In his initial response to Mr VR's complaint, Mr WQ (a) said upon notification of Mr VR's complaint he withdrew his offer to reduce the fee by $1,500, and (b) apologised for Ms QZ having "offered her opinion to Mr VR as to a refund" without his authority.

In Mr WQ's submission the Committee did not give proper consideration to the "fees paragraph" in the firm's letter of engagement which he says shows the firm has "a range of different approaches and calculations" of fees for "different practice areas" which are "particularised on [the firm's] costing documents", but "otherwise are not particularised" on invoices.[18]

He says in "disclos[ing]" the "basis [o]n which fees will be charged", thereby complying with r 3.4(a), the letter of engagement contained "a broad range of information and options" including (a) disclosure of the r 9.1 reasonable fee factors, (b) an explanation that fees were "based on a range" of factors "not just (for example) time", and "drafting and transactional matters" in conveyancing are "usually charged per transaction", and (c) the "invitation to provide a quote".

For conveyancing transactions he said fees had two components: first, a "base" fee comprising time and attendance; and secondly, 0.2% of the farm purchase price, the latter being the firm's "internal method" of assessing a fee which he says "fairly and reasonably takes into account the [r 9.1] factors…in a farming transaction". He acknowledges the total charge "must still be fair and reasonable".

He "concedes" it would have been "better practice to specifically disclose" the percentage charge, which the firm now does, but says that did not mean he and Ms QZ had contravened r 3.4(a).

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[16] Reference to Ms QZ's submissions (19 May 2020).
[17] With the exception of Ms QZ's explanation of her legal work provided to the Committee.
[18] Although both Mr WQ and Ms QZ applied for a review of the Committee's decision, apart from Ms QZ's detailed explanation to the Committee of the firm's work, their responses to Mr VR's complaint, and submissions to the Committee were largely made by Mr WQ.

At the hearing, Mr WQ said he was not "attempting to be sneaky" by not disclosing the percentage charge in the letter of engagement. He said he knows of other law firms in the district which include this charge, and he did not consider the firm was "doing anything wrong" by not disclosing that information. However, wanting to "maintain good relationships" with farming clients he amended the letter of engagement.

Also at the hearing, Ms QZ said the percentage charge "should have been disclosed", and similarly acknowledged the firm had changed its letter of engagement. She said her proposal to refund that charge was "subject to Mr WQ's authority". Ms QZ considers the total fee was fair and reasonable.

(e) Discussion

On 1 July 2019 Mr VR instructed Ms QZ to act on the purchase. The next day Ms QZ received a draft sale and purchase agreement from the vendor's lawyer, and on 3 July 2019 sent the firm's letter of engagement to Mr VR accompanied by client care and service information for clients, and the firm's standard terms of engagement.

The letter of engagement stated (a) the firm's fees would be "based on a range of factors applied by the NZ Law Society including 'time, expertise, importance, urgency, complexity and the results achieved'"; (b) document preparation, and acting on conveyancing transactions would be charged separately; (c) contentious matters including litigation would be "charged, in part, by the hour"; and (d) the specified hourly rate was $390 plus GST.

The firm's accompanying information for clients explained that (a) the letter of engagement contained "[t]he basis on which fees will be charged", (b) the firm's standard terms of engagement explained the timing of payment, and (c) the firm could deduct its fees and disbursements from any funds held by the firm in trust for the client.

The firm's standard terms of engagement similarly stated that the fees the firm "will charge or the manner in which [the fees] will be arrived at" are contained in the letter of engagement, and when billed on an hourly basis the hourly charge out rates contained in the letter of engagement would apply.[19]

Helpful to my consideration of this aspect of Mr VR's complaint is a decision concerning a lawyer, the sole executor and trustee of a client's will, who also acted on

[19] The firm's standard terms of engagement also explained the firm's terms if a "fixed fee" was specified in the letter of engagement; and that an author's time was recorded in 6 minute units rounded up to the next unit of 6 minutes.

the estate administration without a fee agreement, and without having provided information about fees to the beneficiaries.[20]

Similar to the approach taken by Mr WQ and Ms QZ, the lawyer's fee comprised a charge for time and attendance, plus a charge calculated as a percentage of the value of the estate. However, because the events considered took place before 1 August 2008, the date of commencement of the Act and the Rules, the lawyer was not required at that time to provide the client with a letter of engagement containing fee information.

The Review Officer warned that if the lawyer concerned had not explained to the client, or in that case to a beneficiary, at the outset how fees would be determined, caution was required when setting a fee. Moreover, there would "be difficulty in establishing a contractual right to adopt" a charging methodology involving a percentage uplift if the method of charging was not disclosed. [21]

Particularly a fee that included the addition of "a large premium", or where the lawyer had adopted "a billing methodology other than time-cost" to "justify a bill", would "be difficult to do" where the client "was not on notice of a method of billing" apart from "usual time and attendance". In such cases the lawyer would "have to establish as a matter of contract that this is permitted as well as having to establish as a matter of professional conduct that the fee reached is fair and reasonable".[22]

Importantly concerning the application of r 3.4 in the context of Mr WQ's, and Ms QZ's review application, the observation was made in that decision that it would be "unlikely that such a percentage uplift … would be permissible in the absence of explicit reference to it prior to the retainer being entered into". Otherwise the client would not have been able to "compare [that charge] across firms…and choose accordingly".

The parties have not brought to my attention any other communication between them, other than the letter of engagement and Mr WQ's subsequent 25 July 2019 time and cost breakdown, concerning the basis on which the firm's fees would be charged to Mr VR.

As noted, absent from Ms QZ's letter of engagement to Mr VR was any statement or suggestion the fee for the legal work would, in addition to a time and attendance charge at the specified hourly charge out rate, include a charge calculated as a

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[20] *Hunstanton v Cambourne* LCRO 167/2009 (10 February 2010); see ss 132(2), 160(1) of the Act, the complainant/applicant in that matter was a beneficiary.
[21] *Hunstanton* at [47], [50] and [51].
[22] *Hunstanton* at [47] to [49].

percentage of the purchase price. Until receipt of Mr WQ's fees breakdown three weeks later Mr VR did not know the firm's fee would include both charges.

From my analysis of the information produced on this issue, I am led to the conclusion that by not informing Mr VR about the percentage charge in the letter of engagement Mr WQ as principal of the firm, and Ms QZ, then an associate who carried out and had responsibility for the work, contravened their professional obligation and duty required of them in r 3.4(a) to provide that information to Mr VR.

(2) Fair and reasonable fee, fee factors - issues (b), (c)

As I see it, the main issue concerning Mr VR's complaint, and this review is whether Mr WQ's and Ms QZ's fee issued to the company was fair and reasonable.

(a) Overview

Mr VR claims the firm's fee was not fair and reasonable with or without the percentage charge, and whether or not that charge had been disclosed to him in the letter of engagement.

Mr WQ and Ms QZ disagree stating although no premium was charged for urgency, transactions such as Mr VR's purchase "would reasonably attract a premium" for urgency.

(b) Professional rules

Fair and reasonable

Because, in his submissions to the Committee, Mr WQ raised the prospect of "a cost revision", I first draw attention to the fact that from the commencement of the Act on 1 August 2008, the process for cost revisions which applied under the Law Practitioners Act 1982, repealed from that date, ceased. Since then, complaints about lawyers' fees under the Act have been, and are processed in the same way as other conduct complaints about lawyers.[23]

As well as the requirement in r 3.4(a) to provide clients with information about fees at the outset of a matter, when billing a file, r 9 prohibits lawyers from charging clients more than a fee that is fair and reasonable.[24]

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[23] Section 132(2) of the Act.

[24] *AQ v ZI* LCRO 105/2010 (February 2011) at [75]: the fee factors in r 9.1"formalise[s] what was considered to be best practice prior to the Client Care Rules" when "costing guidelines

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

The terms of the retainer, or fees agreement must similarly be fair and reasonable.[25]

[2] Matters to be taken into account by a lawyer when setting a fee, and by a costs assessor, or a Standards Committee, when considering a complaint include:[26]

> (a) … a global approach; (b) what is a reasonable fee may differ between lawyers, but the difference should be "narrow" in most cases; (c) ... time spent … is not the only factor; (d) It is not appropriate to (as an invariable rule) multiply the figure representing the expense of recorded time spent on the transaction by another figure to reflect other factors.

Because the process of determining a fair and reasonable fee is "an exercise in balanced judgment - not an arithmetical calculation", "different [lawyers] may reach different conclusions" about what constitutes a fair and reasonable fee. However, "all should fall within a bracket which, in the vast majority of cases, will be narrow".[27]

[3] When a fees complaint is being considered "there is no presumption or onus either way as to whether the fee was fair and reasonable" and, one lawyer's approach to setting a fee may not necessarily "be a relevant consideration in determining whether a fee is fair and reasonable in all of the circumstances."[28]

[4] There is therefore a "proper reluctance to 'tinker' with bills by adjusting them by small amounts," and Standard's Committees ought not to be "unduly timid" when considering what is a fair and reasonable fee on a particular matter.[29]

[5] Once a fair and reasonable fee has been determined, then an assessment can be made "whether the fee charged is sufficiently close to that amount to properly remain unchanged".[30]

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were included in a New Zealand Law Society publication referred to as New Zealand Law Society Property Transactions: Practice Guidelines 2003".

[25] Rule 9.2.

[26] *Hunstanton v Cambourne*, above n 22 at [22], summarising the principles in *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 (QB) at 441-442, adopted in *Gallagher v Dobson* [1993] 3 NZLR 611 (HC) at p 620. See also *Chean & Luvit Foods International Ltd v Kensington Swan* HC Auckland CIV 2006-404-1047, 7 June 2006 at [24] referred to in *AA v BL* LCRO 264/2012 (25 July 2013) at [57].

[27] *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* at 441–442; *Hunstanton v Cambourne* at [21], [62].

[28] *Hunstanton* at [15] and [63].

[29] *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* at 441-442, adopted in *Gallagher v Dobson* at p 620, cited in *Hunstanton v Cambourne* at [62].

[30] *Hunstanton* at [64].

Fee factors

As noted above, r 9 prohibits a lawyer from charging a fee for the services provided that is not a fair and reasonable fee having regard to (a) the interests of both the client and the lawyer, and (b) " factors to be taken into account" thirteen of which are included in r 9.1.

As discussed below, the Committee considered six of those factors were relevant.

(c) Parties' positions

Mr VR

Mr VR says although he paid "without dispute" $6,552 plus GST representing the "time and labour" component of the firm's fee, he did not consider that was fair and reasonable.

He says having "quer[ied] how the hours worked" could result in the fee of $12,603.05 plus GST, it was not until he reviewed Mr WQ's time cost breakdown did he realise the fee included the charge of $6,051.05 representing 0.2 per cent of the purchase price.

He asks how Mr WQ could still "maintain [the firm's] fee was fair" yet (a) acknowledge the percentage method of determining a fee was not disclosed to him, and (b) now accept disclosure is "preferable".

At the hearing, Mr VR said in response to his query Mr WQ told him the fee was "standard". However, he said he is in "no position to make an assessment" of what constitutes a fair and reasonable fee. He said from his enquiries not all law firms made a percentage charge, and he "would have obtained other estimates/quotes" had he known the firm would include that charge in the fee.[31]

Mr VR said omission of information by Mr WQ and Ms QZ from the letter of engagement "may create a false impression". In his view Mr WQ's and Ms QZ's statement they did not know of other law firms that "specifically identify" an additional percentage charge in their letters of engagement indicated "a wider industry problem of inadequate disclosure" or a cartel. [32]

In his submission, no emphasis was warranted for the fee factors noted in the letter of engagement in determining the fee.

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[31] Mr VR said some firms told him they charged "a fixed fee plus a percentage scale charge" on farm transactions.

[32] Mr VR referred to the Fair Trading Act 1986.

Urgency - r 9.1(d)

Mr VR says (a) there was "no specific deadline", (b) the family "had already worked out the sale details over the [previous] six months" before engaging the firm, and (c) the vendor's lawyers had prepared the sale agreement before the firm was instructed.

He says he and the vendor were customers of the bank which had "pre-approved the lending and conditions" for the loan to the company. He explains the settlement date, which took place within 25 days – "5 or 6 days less than a month" – of the firm being instructed "mostly revolved around the lead-time" for receiving the bank loan documents, had "already [been] altered to suit", and "could have continued to shift without issue if required".

Degree of risk - r 9.1(e)

In his view, because the purchase price was "at the very low end of the scale" for a farm, the "degree of risk" assumed by the firm was "relatively low".

Complexity - r 9.1(f)

He says the purchase, "between related parties using the same lender" with "no outside third-party", was "remarkably straightforward". He claims if, as Mr WQ states, the purchase was "not typical of a farm purchase", then [Mr WQ's] "intent[ion] to charge a 0.2% premium" ought to have disclosed in the letter of engagement.[33]

Mr VR says because the vendor's lawyer prepared the purchase agreement, the terms of which had been agreed, for the firm to "peruse", the absence of a vendor's agent did not add complexity to the purchase.

Mr WQ, Ms QZ

Mr WQ says in response to Mr VR's query he "explained" that the percentage charge of the "transaction value", which took into account all of the fee factors, was "reasonable and appropriate" for "normal farm transactions". In saying that he said he accepted that was "not a definitive approach", and it was necessary to "check each fee".

Mr WQ said whilst the fee factors, including urgency, needed to be "looked at", the percentage charge was "a starting place".

[33] Letters from Mr WQ to (1) Mr VR, (13 August 2019); (2) LCS (17 February 2020) - referred to by Mr VR.

He says as “a private” family transaction, without the “usual assistance” of a real estate agent “negotiating and drafting” the purchase terms, Mr VR’s purchase was “not typical of a farm sale and purchase”. He says “urgency” was relevant, but a premium was not charged for that factor. He doubts another law firm would act on a farm purchase like Mr VR’s, to be settled “in 14 days”, without urgency being a factor.

At the hearing, Mr WQ submitted the Committee did not give proper consideration to the “fees paragraph” in the firm’s letter of engagement which he says, as noted above (a) refers to the fee factors, (b) explains that conveyancing transactions are usually charged per transaction, and (c) invites the client to ask for a fees quote.

In his submission the firm’s fee was fair and reasonable having been determined by the firm’s “own internal [percentage] method” which he understood was “widely used in the industry”, and took into account the fee factors in r 9.1 yet recognising the fee determined “must still be fair and reasonable”. Therefore, he says, any partial refund of the fee would be “a windfall” for Mr VR.

He explained having made “inquiries of other firms”, to assist clients he amended the firm’s letter of engagement in an “attempt to summarise” the requirements of rr 9 and 9.1. He said he “always thought [he] was entitled to look” at the percentage charge as an “internal” method of setting a fee, but now accepts this must be disclosed to clients.

(d) Discussion

As noted above, because determination of a fee is “an exercise in balanced judgment - not an arithmetical calculation”, it is “wrong” to first assess “the direct and indirect expense” to the lawyer “represented by the [lawyer’s] time spent” on the matter. That “must be taken into account”, but “is not necessarily, or even usually a basic factor to which all other [factors] are related”.[34]

Furthermore, because there is “no presumption or onus either way” that a fee is fair and reasonable, it is not appropriate for a costs assessor, or a Standards Committee, to start the assessment with the fee “actually charged and consider whether [the fee] is justifiable”. To do so “put[s] the cart before the horse” thereby risking “an unconscious presumption that the [fee] is appropriate”.[35]

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[34] *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment*, above n 28 at p 441–442.

[35] *Hunstanton* at [63]. The Review Officer directed that the Standards Committee reconsider the complaint taking these matters into account.

It follows that in applying these principles the proper method is to approach the assessment without a preconceived notion as to what may constitute a fair and reasonable fee for the particular legal work.

If the value of a property "may warrant some increase" in the fee, such increase "is better reflected" in a weighting of the factors such as the responsibility to carry out the work, the importance of the matter, urgency, or the degree of risk assumed by the lawyer in carrying out the work.[36] That would not rule out the value of a property "never be[ing[[an] appropriate" consideration so long as "properly disclosed" to the client who could then "shop around" with other lawyers before deciding whether or not to retain the lawyer concerned.[37]

The decision I have referred to, where the lawyer's fee for acting on an estate administration included a percentage charge based on the value of the estate, provides an illustration of the proper approach to determining a fair and reasonable fee. There the Standards Committee was directed to reconsider the matter because the costs assessor had "proceeded on a wrong principle" which resulted in the Committee making a decision that was "unsafe".[38]

In another example where the lawyer's fee for acting on the purchase of a rural property was, as on this review, determined as a percentage of the purchase price, the lawyer was held to have "risked" contravening rr 9 and 9.1 by taking into account "only the value of the property". The Review Officer observed whilst the value of the property is a factor, the main consideration was the fee determined, not necessarily "the way" it was calculated.[39]

It is to be noted that the Standards Committees Practice Note recommends that fee complaints be delegated by a Standards Committee either to a costs assessor appointed for the purpose, or to a member of the Standards Committee.[40]

Either way the costs assessor is required to carry out an analysis of the lawyer's fee and the client's file, and report to the Committee concerning (a) a fee which is considered fair and reasonable, or (b) a range within which a fee would be considered

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[36] *Hunstanton* at [32].
[37] *Hunstanton* at [65].
[38] *Hunstanton* at [43] and [66]; the Standards Committee had adopted the costs assessor's report assuming that was appropriate.
[39] *J v A* LCRO 31/2009 (30 April 2009) at [30].
[40] New Zealand Law Society *Practice Note Concerning the Functions and Operations of Lawyers Standards Committees* at Chapter 10; including Model Document 7 comprising a delegation to a costs assessor under s 184(1) of the Act.

fair and reasonable, and (c) bring to the Standards Committee's attention anything else considered relevant that came to light during the investigation.

Whilst not expected to express a view about whether he or she considers the lawyer has contravened a professional rule, as part of the investigation a costs assessor is expected to meet with the lawyer and complainant together.

The Committee did not request a report from a costs assessor, instead doing its own assessment. Having referred to a number of the fee factors in r 9.1 considered relevant, the Committee determined (a) Mr WQ's, and Ms QZ's fee, although "at the higher end of the range", was fair and reasonable, and (b) Mr WQ and Ms QZ had not contravened r 9.

In reaching that decision the Committee:

(a) noted that Ms QZ's time recorded, which when multiplied by her hourly charge out rate resulted in approximately half of the fee charged, was "consistent with the time" the Committee "expected would be required" and was therefore "reasonable" (r 9.1(a));

(b) considered Mr WQ and Ms QZ, as "experienced lawyers", were "well placed to advise" Mr VR on the purchase (r 9.1(b));

(c) considered an "uplift" for urgency was justified (r 9.1(d));

(d) noted Mr WQ and Ms QZ assumed "considerable risks" acting on the matter (r 9.1(e));

(e) stated the transaction was "moderately complex" which gave rise to urgency (r 9.1(f));

(f) noted it was "not uncommon for other lawyers to charge a premium on similar transactions" (r 9.1(m)).

Although the Committee considered Ms QZ's "time and labour" recorded was "reasonable", no view was expressed about the appropriateness of the hourly charge out rate of $390 plus GST. In particular, whether that rate incorporated a weighting for other factors such as the skill, specialised knowledge and responsibility required (r 9.1(b)), the importance of the matter to Mr VR (r 9.1(c)), the degree of risk, including the amount or value of any property involved (r 9.1(e)), and the fee customarily charged in the district and locality (r 9.1(m)).

It follows the Committee's view that an "uplift" for the "urgency" factor, and a "premium" for "the fee customarily charged" factor were warranted, could only have concerned the percentage charge which Mr WQ, and Ms QZ added to their time and attendance charge.

As I read the Committee's approach towards its assessment, the Committee started with the total fee, and then worked backwards by considering the fee factors to ascertain whether the fee was justified instead of the other way around as recommended by the Courts, and in the decisions I have referred to. The Committee considered the fee was at the top end of the range within which fees could be regarded as fair and reasonable, but did not specify particular fees within that range.

Whilst Standards Committees include lawyer members who are experts in their respective fields of practice, it is to be expected a report from a costs assessor known for his or her expertise in the practice area concerned would include a detailed discussion of (a) the legal work undertaken; (b) the quality of the legal work by reference to the authors' qualifications and experience; (c) the appropriateness of the hourly charge out rate applied; (d) the relevance of those of the fee factors in r 9.1 considered particularly relevant, and whether a weighting was warranted; and (e) as noted, a range of fees within which the assessor considers would be fair and reasonable.

As such, a costs assessor's report can be an invaluable aid for a Standards Committee in its deliberations concerning a fees complaint.

The conclusion I have reached from my analysis of the information produced on these issues is that I am not satisfied the Committee took the proper approach in its deliberations concerning Mr VR's fee complaint. Furthermore, without the benefit of a detailed cost assessment, of the type described in the Practice Note, I am not able to express an informed view whether the firm's total fee of $12,603.05, which included the percentage charge not disclosed to Mr VR at the outset, plus GST and disbursements is necessarily fair and reasonable to both the firm and Mr VR alike.

[6] I am not in a position to carry out that assessment. For these reasons, the proper and appropriate course is for me to return the matter for reconsideration by another Standards Committee having first delegated the task of undertaking an assessment to a costs assessor for that purpose.

Conclusion

Because I have found Mr WQ, and Ms QZ contravened r 3.4(a) of the Rules by not disclosing the percentage charge to Mr VR in their letter of engagement, it is open to me to confirm the Committee's finding of unsatisfactory conduct against them under s 12(c) of the Act. However, by a narrow margin I do not propose to do so, for a number of reasons.

A breach of the Act, if established, does not automatically attract a disciplinary sanction. In *Burgess v Tait* the Court observed that:[41]

> The ability to take no further action on a complaint can be exercised legitimately in a wide range of circumstances, including those which would justify taking no action under s 138(1) and (2). It is not confined to circumstances where there is no basis for the complaint at all.

That position was affirmed in *Chapman v The Legal Complaints Review Officer* where the Court noted that:[42]

> … it appears to me that the LCRO may have assumed that her finding of unsatisfactory conduct inevitably led to the setting aside of the Committee's decision to take no further action under s 138. No point has been taken on this but any such assumption would be incorrect. The discretion which s 138 confers subsists throughout.

In conducting a review, the LCRO may exercise any of the powers that could have been exercised by the Standards Committee in the proceedings in which the decision was made or the powers were exercised or could have been exercised.[43]

Included in those powers, is the ability to exercise a discretion to take no action, or no further action on the complaint.[44] That discretion may be exercised in circumstances where the Review Officer, having regard to all the circumstances of the case, determines that any further action is unnecessary or inappropriate.[45]

My particular reasons for not confirming the Committee's adverse findings are:

(a) Mr WQ believed, albeit mistakenly, that the percentage charge was an appropriate approach to take when setting a fee.

(b) His statements at the hearing that (i) he did not consider he was "doing anything wrong" by applying the percentage charge as "an internal

[41] *Burgess v Tait* [2014] NZHC 2408 at [82].
[42] Thada-Anne Chapman [2015] NZHC 1500 at [47].
[43] Lawyers and Conveyancers Act 2006, s 211(1)(b).
[44] Section 138.
[45] Section 138(2).

method" of taking into account the fee factors to arrive at a fair and reasonable fee, and (ii) he had no intention to mislead.

(c) arising out of Mr VR's complaint Mr WQ says he has since included in the firm's letter of engagement to clients the intention to include that percentage charge in the firm's fee, albeit as I have explained, that approach towards determining the fee carries with it the risk of a contravention of r 9 by the lawyer concerned.

(d) Ms QZ's (i) response to Mr VR's fee query at the time that the percentage charge should have been disclosed, and (ii) her proposal, which Mr WQ declined to implement, to refund that component of the firm's fee.

[7] For completeness I record that towards the end of the hearing I suggested to the parties they may wish to take the opportunity of resolving their differences before I reached my decision. Whilst Mr WQ and Ms QZ were willing to do so Mr VR declined stating, in effect, Mr WQ had not during the two and a half years since the fee invoice was issued considered a fee settlement, in particular Ms QZ's settlement proposal.

[8] I appreciate the parties will be disappointed I am not able to finalise this matter, but it is to be hoped the Standards Committee to which this matter is referred for reconsideration will appoint a costs assessor as soon as practicable.

Decision

[9] For the above reasons, pursuant to s 211(1)(a) of the Act, the decision of the Committee is:

(a) Reversed as to the Committee's finding that Mr WQ's and Ms QZ's fee of $12,603.05 plus GST charged by them to the company was fair and reasonable.

(b) Reversed as to the Committee's finding that by not informing Mr VR in the firm's letter of engagement that the firm's fees would include a charge of 0.2 per cent of the purchase price, Mr WQ and Ms QZ contravened r 3.4 (a) of the Rules which, pursuant to s 12(c) of the Act, constitutes unsatisfactory conduct.

(c) Reversed as to the Committee's orders that Mr WQ and Ms QZ reduce their fees in their invoice dated 24 July 2019 by $6,051.05, and refund

that money to the company. Without a finding of unsatisfactory conduct those orders fall away. (s 156(1)(e), (g)) [46]

[10] Pursuant to s 209(1)(a) of the Act I direct that another Standards Committee reconsider and determine whether Mr WQ's and Ms QZ's fee of $12,603.05 plus GST for acting for the company on the purchase of the farm property and related activities, invoiced to, and paid by the client by way of deduction was, as provided in r 9, not "more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1".

Anonymised publication

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

DATED this 29th day of March 2022

BA Galloway
Legal Complaints Review Officer

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

Mr WQ, Ms QZ as the Applicant
[Company A] as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society

[46] Standards Committee determination at [36].