LCRO 21/2017

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	**AJ** Applicant
AND	**AK** Respondent

DECISION

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

Introduction

[1] Mr AJ has applied to review a decision of the [Area] Standards Committee [X] (the Committee), in which the Committee made a finding of unsatisfactory conduct against him.

Background

[2] The background to the Committee's inquiry and determination is extensively covered in the Committee's decision and I do not propose to repeat the detail of that background in this decision.

[3] To summarise that background, Mr AJ was acting for Mr AK in relationship property proceedings in the Family Court.

[4] A fixed-fee of $15,000 plus GST and disbursements was agreed between Mr AJ and Mr AK.

[5] A partial settlement was achieved at a Judicial Settlement Conference in June 2011. In particular, it was agreed that Mr AK would retain a motor vehicle valued at $3,000 and his former partner would retain one valued at $53,000 (the vehicles agreement).

[6] Other issues required a defended hearing before a judge.

[7] That hearing took place in mid-May 2012. On [date], the Court delivered a judgment on the remaining issues (the judgment).[1]

[8] The Court ordered the sales of two properties and the division of those proceeds on a basis that included adjustments in favour of Mr AK for capital reductions in mortgages.

[9] The vehicles agreement was referred to in the judgment under the heading "Should there be an adjustment for [Mr AK's] use of the residential properties post-separation". The judge said:[2]

> [90] This aspect of the case was not well argued by either side. There is no analysis presented. I have to deal with this matter by way of broad assessment and impression. Nevertheless, I have come to a clear view.
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> …
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> [95] The two pieces of real estate have a combined equity of $167,323. [Mr AK's former partner] has a vehicle worth $53,000 and Mr AK a vehicle worth $3,000.
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> [100] … Having regard to the fact that [Mr AK's former partner] has had the advantage of the much more expensive vehicle [over two years and eight months], and one of the properties housed their child, I think it would be disproportionate and unfair to adjust between the parties for Mr AK's post-separation [word missing] of [his former partner's] interest in the properties.
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> …
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> [106] [Mr AK's former partner] shall retain the [make] vehicle at $53,000 and Mr AK shall retain the [make] vehicle at $3,000.

[10] At the end of the judgment the Judge said (clarifying orders):[3]

> Leave is reserved for either party to apply on 48 hours' notice for orders to give better effect to these orders.

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[1] *PC v YP* [2012] NZFC 3538.
[2] At [90]–[100]. I infer that the word missing from [100] in the judgment is "use". Mr AK had resided in one of the couple's properties with his parents, post-separation and his former partner sought an adjustment in her favour for occupation rent.
[3] At [109].

[11] The parties agreed that Mr AJ would act in the conveyancing necessary to give effect to the orders for sale. He charged a fee for that work. The net sale proceeds from the properties were to be held and distributed from Mr AJ's trust account once the parties had agreed their respective shares.

[12] Some cash distributions were made by agreement. However, the parties could not agree on the final division of the trust account funds (the remaining trust account funds).[4]

[13] Mr AK, supported by Mr AJ, considered that he was entitled to a greater share of the remaining trust account funds than his former partner. He considered that there should be an adjustment in his favour to reflect the difference in the values of the vehicles each retained under the vehicles agreement.

[14] In dispute was whether the judgment dealt with that issue clearly.

[15] The impasse between the parties was not resolved and neither side sought clarifying orders from the Court. Their last correspondence about the issue was on 24 October 2012, when the lawyer for the other party wrote to Mr AJ, and confirmed his and his client's position as to the distribution of the remaining trust account funds.

[16] Relevant to the background is that on [date] Mr AJ was suspended from practice for 10 months, by the Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal). The suspension took effect from [date].

[17] That period of suspension was later reduced to four months by the High Court.[5] The effect of that was that Mr AJ's suspension ended on the date of the Court's judgment, which was [date].

[18] During his period of suspension, Mr AJ's client files were managed by his attorney, Mr L.

[19] Mr AK continued to press Mr AJ to take some steps to resolve the impasse. In [date], Mr AJ served a notice under the Trespass Act 1980 on Mr AK (the Trespass Notice) and terminated his retainer.

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[4] The detail of that disagreement is extensively dealt with by the Committee in its decision at [5]–[17].
[5] *Hong v Auckland Standards Committee No 3* [2014] NZHC 2871.

[20] Mr AJ continues to hold the remaining trust account funds, which now amount to approximately $22,000.

Complaint

[21] Mr AK lodged a complaint with the New Zealand Law Society Lawyers Complaints Service (Complaints Service) on or about 27 January 2016. The substance of Mr AK's complaint was that Mr AJ:

(a) had agreed to seek clarifying orders from the Judge about the correct division of the trust account funds;

(b) then refused and failed to do so; and

(c) has failed to account to him for the trust account funds.

[22] Attached to Mr AK's complaint was a copy of Mr AJ's terms of engagement that had been signed by Mr AK on 8 July 2010. As well as that, Mr AK provided a copy of a letter from Mr AJ to Mr AK dated 24 March 2015, in which Mr AJ indicated he would seek clarifying orders within six months of the date of that letter.

Response by Mr AJ

[23] In response, on 17 April 2016 Mr AJ submitted:

(a) His fixed-fee retainer with Mr AK did not extend to him applying for clarifying orders.

(b) As a stakeholder, he could not do anything with the remaining trust account funds unless both parties agreed or the Court made an order.

(c) When he was suspended by the Tribunal in [date], Mr AJ referred Mr AK to Mr L and advised Mr AK that Mr L would charge a fee to do the necessary work.

(d) On 8 September 2014, Mr AK offered to pay Mr AJ a fee of $2,000 for this work.

(e) Mr AJ told Mr AK that he would apply for the clarifying orders if his suspension was lifted, at a fee of $2,000.

(f) Following Mr AJ's return to practice in [month] 2014, Mr AK made persistent demands of Mr AJ to carry out the work. Mr AJ reluctantly

agreed to apply for clarifying orders in a letter to Mr AK dated 24 March 2015. This was on the basis that Mr AJ would require six months from then to prepare the necessary court documents.

(g) Mr AJ completed a draft set of documents in September 2015 and asked Mr AK for additional information to complete the documents, but Mr AK has never provided that information.

(h) Mr AK became unmanageable and so Mr AJ terminated the retainer in January 2016 at the same time as serving the Trespass Notice.

(i) Moreover, Mr AJ was, and continues to be, too busy with other client matters to commence another retainer with Mr AK to apply for clarifying orders.

Further comment by Mr AK

[24] In an email to the Complaints Service dated 27 April 2016 commenting on Mr AJ's response, Mr AK said:

> After 7 years, my lawyer said need $2,000 to help me to settle this problem but in our contract I already paid him the lawyer fees. … Me as a client I had paid what I should pay for it and I [don't] want to [pay further] fees anymore.

Standards Committee decision

[25] The Committee delivered its decision on 30 November 2016.

[26] The Committee identified the following issues for consideration:[6]

(a) whether Mr AJ was grossly or seriously negligent in failing to take steps to resolve the impasse about the trust account funds, between 2012 and 2016 and whether Mr AJ failed to competently advise Mr AK how to resolve the dispute;

(b) whether Mr AJ has failed to account to Mr AK for the trust account funds and if so, whether that involves a breach of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules); and

[6] Standards Committee determination, 30 November 2016 at [4].

(c) whether Mr AJ failed to apply for clarifying orders within six months of 24 March 2015 and if so, whether this amounted to a breach of Mr AJ's professional obligations under the Rules or otherwise.

[27] After setting out the detail of the dispute between the parties over the division of the trust account funds, the Committee noted that:[7]

> Rule 3 of the [Rules] requires a lawyer to always act competently and in a timely manner consistent with the terms of their retainer.
>
> …
>
> it is not uncommon for disagreements to arise between lawyers regarding the proper interpretation of a judgment. What was concerning, however, was that despite having been unable to resolve matters directly with [the lawyer on the other side], Mr AJ has taken no meaningful steps in terms of progressing matters since October 2012. The obvious solution would have been for Mr AJ to file a simple memorandum with the Court outlining the dispute that had arisen and asking the Court to provide clarification.

[28] The Committee rejected Mr AJ's explanation that he was too busy to attend to the matter, saying that "the matter was clearly urgent and Mr AJ was obliged to see matters through to completion".[8]

[29] The Committee further said:[9]

> It was incumbent on Mr AJ to take steps to determine, once and for all, who the funds belonged to so that they could be paid out accordingly. [The Committee] also noted that, as an officer of the Court, Mr AJ owed a duty to the Court to ensure that effect was given to [the Court's decision] … in accordance with his client's instructions.

[30] In describing Mr AJ's conduct, the Committee said:[10]

> Mr AJ's effective refusal to file an application with the Court, in accordance with his client's unequivocal instructions, … constituted gross negligence and/or incompetence which fell within the definition of unsatisfactory conduct as set out in sections 12(a) and 12(b) of the Act. It was [the Committee's view] that Mr AJ's actions constituted conduct which fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. Mr AJ's conduct would also clearly be regarded by lawyers of good standing as being unacceptable. Mr AJ also clearly failed to comply with his obligations under Rule 3 such that his conduct could be considered unsatisfactory in terms of section 12(c) of the Act.

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[7] At [18]–[19].
[8] At [20].
[9] At [21].
[10] At [22].

[31] The Committee also considered that Mr AJ's failure to take steps to determine the legal ownership of the funds so that they could be paid as the owner directs, breached s 110 of the Lawyers and Conveyancers Act 2006 (the Act) and was unsatisfactory conduct pursuant to s 12(c) of the Act.[11]

[32] By way of penalty and other orders, the Committee:[12]

(a) Censured Mr AJ.

(b) Ordered him to pay a fine of $7,500.

(c) Ordered him to pay costs of $1,000.

(d) Ordered him to pay compensation to Mr AK, in the form of Mr AK's actual and reasonable legal costs incurred in instructing legal counsel to apply to the Family Court to resolve the matter of distribution and division of the remaining funds in his trust account.

Application for review

[33] Mr AJ filed an application for review on 17 January 2017. The outcome sought is that the Committee's determination "is squashed in all respects".

[34] In support Mr AJ submits:

a) He was entitled to be paid by Mr AK for the work involved in seeking clarifying orders.

b) He drafted documents in September 2015 and asked Mr AK for further information, but was never provided with that information by Mr AK.

c) He validly terminated his retainer (on 10 January 2016) for the following reasons:

i. he did not have time to complete the work;

ii. he had not finalised the fee arrangements — the agreed $2,000 did not cover "further meetings";

iii. Mr AK had not provided the additional information requested in September 2015; and

[11] At [23].
[12] At [27]–[28].

iv. Mr AK's father had become violent and aggressive towards Mr AJ.

d) The finding of negligence and incompetence was "preposterous".

e) Section 110 of the Act has no application when Mr AJ was acting as a stakeholder.

f) the Complaints Service has no power to compel a lawyer to do work for a client without payment, and no power to penalise a lawyer for not acting when a client has "repudiated his obligation to pay".

[35] Mr AJ seeks costs against the Complaints Service.

Nature and scope of review

[36] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[13]

> … 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.

[37] More recently, the High Court has described a review by this Office in the following way:[14]

> 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.

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

[38] 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.

Statutory delegation and hearing in person

[39] Prior to the hearing, Mr AJ filed written submissions dated 27 November 2017, together with electronic copies of substantial correspondence from Mr AK's client file. That material has been carefully read.

[40] As the Legal Complaints Review Officer (LCRO) with responsibility for deciding this application for review, I appointed Mr Robert Hesketh as my statutory delegate to assist me in that task.[15] As part of that delegation, on 4 December 2017 at Auckland, Mr Hesketh conducted a hearing at which Mr AJ appeared in person.

[41] The process by which a LCRO may delegate functions and powers to a duly appointed delegate was explained to Mr AJ by Mr Hesketh. Mr AJ indicated that he understood that process and took no issue with it.

[42] Mr Hesketh has reported to me about that hearing and we have conferred about the complaint, the application for review and my decision. There are no additional issues or questions in my mind that necessitate any further submissions from either party.

Analysis

Issues

[43] The issues for determination in this review include:

(a) What was the scope of Mr AJ's fixed-fee retainer with Mr AK? Did it include a requirement to apply for clarifying orders?

(b) If the answer is that Mr AJ was obliged to apply for clarifying orders as part of his fixed-fee retainer, do any conduct issues arise as a result of him not doing so?

[15] Lawyers and Conveyancers Act 2006, sch 3, cl 6.

(c) If the answer is that Mr AJ was not obliged to apply for clarifying orders as part of his fixed-fee retainer, do any other conduct issues arise that call for a disciplinary response?

(d) Was Mr AJ a stakeholder of the sale proceeds and if so, what were the extent of his responsibilities?

Mr AJ's argument

[44] Mr AJ's position is that his retainer came to an end when the Court's judgment was delivered on [date], and he explained its meaning and effect (including whether to appeal) to Mr AK; this being consistent with the written terms of engagement that Mr AK had signed.

[45] Mr AJ argues that his retainer did not require him to take any further steps, including applying for clarifying orders. If further steps were required, they would need to be the subject of a separate retainer with separate fee (and other) arrangements. He said that he had indicated a fee of $2,000 to Mr AK.

[46] A fee of $2,000 was agreed to by Mr AK on 8 September 2014.

[47] Mr AJ submits that he was too busy with other client matters to immediately begin the work, however on 24 March 2015 he confirmed that he would apply for clarifying orders, but made it clear that he could not do so until September of that year.

[48] Mr AJ submits that in September 2015, he spent an entire weekend preparing the documents required to seek the clarifying orders and emailed Mr AK on 28 September 2015 seeking additional information necessary to complete the documents. However, Mr AK has never provided the required information.

[49] Mr AK's persistence became overbearing and so Mr AJ was forced to serve him with a notice under the Trespass Act 1980. He terminated his retainer with Mr AK on 10 January 2016 after Mr AK had made threats against him.

[50] Finally, Mr AJ submits that as a stakeholder he was obliged to hold the funds on behalf of his client and his client's former partner, and not disburse them unless they either agreed, or the Court ordered.

Discussion

Scope of retainer

[51] Mr AJ's client care letter to Mr AK, which Mr AK signed on 8 July 2010, was for a fixed fee of $15,000 plus GST and disbursements (fixed-fee retainer).

[52] The work to be done was described as being in two "stages". Stage one involved work up to proceedings being issued. Stage two was described as "Court appearances". "Non-important procedural appearances" were excluded from the scope of the work to be done by Mr AJ.

[53] The second stage included the following:

> **Second stage**
>
> …
>
> f) **Final judgment:** On receipt of the final judgment (decision) from the Judge, explain that to you so you know why the Judge came to the views he did (whether in your favour or not). This will also allow you to determine whether you want to appeal
>
> **Specifically excluded**
>
> I/We agree that the following events/matters are excluded and if I/We require you to undertake them, I/We will further pay you for your time at your hourly rate:-
>
> - **Hearing required caused by me/our actions or omissions:** Any Court hearing required because of my/our actions or omissions;
> - **Hearing of issues not disclosed by me/us to you:** Any Court hearing.
> - **Any Appeals Excluded:** This engagement excludes any appeal should you wish to appeal and such appear will be a totally separate matter which I will discuss with you if you are unhappy with the judgment/decision as issued by the Judge.

[54] Neither included nor excluded, is the situation that arose in Mr AK's proceedings: the need to seek clarifying orders as provided for by the Judge in his judgment.

[55] The question is, therefore, whether Mr AJ's terms of engagement contain an implied term that the scope of his fixed-fee retainer with Mr AK included taking steps necessary to implement and give effect to the judgment. In relation to this judgment and the impasse between the parties, that involved seeking clarifying orders.

[56] In *Young v Hansen,* the Court of Appeal held that "the person who asserts a contract of retainer bears the onus of establishing both the existence and the terms of the contract".[16]

[57] In the present case, Mr AJ asserts that his fixed-fee retainer does not include a requirement to apply for clarifying orders. In terms of *Young* this means that Mr AJ carries the burden of establishing the scope of the retainer with Mr AK. He has endeavoured to do so by reference to his terms of engagement, which he submits very clearly limit his fixed-fee work to attendances up to receipt and explanation of the judgment. He also submits that his position as a stakeholder defined and limited his obligations.

[58] Is this correct, or was Mr AJ obliged to go further?

[59] In *Gilbert v Shannahan* the Court of Appeal held:[17]

> Solicitor's duties are governed by the scope of their retainer, but it would be unreasonable and artificial to define that scope by reference only to the client's express instructions. *Matters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer***.** (emphasis added)

[60] As to implying terms into a retainer, the learned author of *Lawyers' Professional Responsibility* has said:[18]

> Various terms are implied into retainers as a matter of law, giving effect to the nature of the relationship created thereby. The basic implied term requires lawyers to use their best endeavours to protect client interests, and to exercise reasonable care and skill in carrying out by all proper means the client instructions under the retainer [citation omitted]. … *Also implied into the retainer are terms authorising the lawyer to do all things incidental to the object of the retainer.* (emphasis added)

[61] In relation to the scope of the retainer, the Committee took the view that because "it is not uncommon for disagreements to arise between lawyers regarding the proper interpretation of a judgment" then "Mr AJ was obliged to see matters through to completion".[19]

[62] Going further, the Committee held that it:[20]

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[16] *Young v Hansen* [2004] 1 NZLR 37 (CA) at [37].
[17] *Gilbert v Shannahan* [1998] 3 NZLR 528 (CA) at 537.
[18] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [3.30].
[19] Standards Committee determination, above n 6, at [19]–[20].
[20] At [21].

> rejected Mr AJ's submission that he was in some way relieved of the obligation to attend to the matter because of Mr AK's alleged reluctance to pay any further legal costs

[63] The Committee held that:

> it was incumbent on Mr AJ to take steps to determine, once and for all, who the funds belonged to so that they could be paid out accordingly. The [Committee] also noted that, as an officer of the Court, Mr AJ owed a duty to the Court to ensure that effect was given to [the Judge's decision] in accordance with his client's instructions.

[64] I do not necessarily agree with the Committee's observation that it is not uncommon for lawyers to disagree about the interpretation of a judgment. However, I do not consider that this is relevant to the issue about the scope of Mr AJ's retainer with Mr AK.

[65] It is clear that in its determination the Committee had in mind the Court of Appeal's judgment *Gilbert.* In particular, that the need to apply for clarifying orders is a matter that fairly and reasonably arose in the course of carrying out Mr AK's instructions and must be regarded as coming within the scope of the retainer.

[66] In my view if, because of the way in which Mr AJ presented his client's case, the judgment was imprecise or unclear — for example he omitted to lead relevant evidence or make a necessary submission — then the obligation to put matters right would rest with Mr AJ and at no cost to his client.

[67] A helpful way of approaching the question of implied terms, is to pose this question: if an informed bystander had asked the parties at the time that Mr AK signed the terms of engagement, "does this fixed-fee include going back to the Judge after judgment to clarify something?"

[68] The answer to that question is, in my view, informed in part by the Rules.

[69] Those rules variously provide:

> 3. In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.
>
> 4.2 A lawyer who has been retained by a client must complete the regulated services required by the client under the retainer …

[70] In my assessment, the answer to the informed bystander's question would be that if the need to seek clarification arose because of some act or omission on the part of the lawyer, then it is an implied term of the retainer that the lawyer has a

duty to take steps to seek appropriate clarification and to do so at no cost to their client. The judgment may then be implemented without further difficulty, thereby completing the retainer.

[71] As well as by reference to the Rules, the parties' conduct is relevant when considering whether a particular term can be implied into a contract of retainer.

[72] There are a number of matters, the cumulative effect of which persuade me that it is appropriate to imply a term into the parties' fixed-fee retainer that obliged Mr AJ to apply for the clarifying orders as part of that retainer.

The Rules

[73] First, the Rules contemplate completion of the services contemplated by the retainer.[21] In Mr AK's case, this was to obtain an enforceable judgment.

Criticism in the Family Court's judgment

[74] Secondly, the relevant part of the Family Court's judgment begins with criticism of both counsel for not adequately arguing the issue of adjustments, which included the vehicles agreement.[22] A reasonable conclusion to draw from this, is that with better evidence and argument the process of adjustments could have been more comprehensively completed by the Judge. The result might have been a better understanding by the parties of the relevance of the vehicles agreements to adjustments.

[75] The fact that the lawyers' inattention to detail contributed to the eventual impasse favours, in my view, a conclusion that steps ought to have been taken to put that matter right.

[76] Having said that, I note that in an email to Mr AK dated 16 January 2016, Mr AJ noted that Mr AK's former partner "had since paid her lawyer … several thousands of dollars after the Court judgment just by all these arguing … I have not been paid any more fees by you and that has to stop."

[77] There is no evidence before me, beyond that email, of Mr AK's former partner having paid her lawyer post-judgment fees and if so, for what. I do not know what the fees arrangements were between the other lawyer and their client, and if post-judgment fees were paid, what those fees related to. I am concerned with

[21] Rule 4.2.
[22] *PC v YP,* above n 1, at [90].

Mr AJ's conduct and not that of the lawyer for Mr AK's former partner. Moreover, it is possible, although speculative, that the other lawyers had been instructed not to take any formal steps.

Post-judgment correspondence in 2012

[78] Thirdly, I note that between approximately August and October 2012, Mr AJ exchanged correspondence with the lawyer on the other side about an initial distribution of the funds and the further division of the remaining trust account funds

[79] The period of time between receipt of the judgment on 28 May 2012 and Mr AJ's initial correspondence to the lawyer on the other side in August 2012, was taken up with the property sales and associated conveyancing. It was reasonable to await the conclusion of that before turning attention to the division of the funds held in Mr AJ's trust account.

[80] In email correspondence to the lawyer on the other side dated 23 October 2012, Mr AJ said "I expect a response and resolution by this week failing which an application will be made to the Judge". I infer from this that Mr AJ understood that it may be necessary to apply for clarifying orders from the Judge.

[81] It was the emphatic rejection of Mr AK's position about the vehicles agreement by the lawyer on the other side, that brought the parties' correspondence to an end on 24 October 2012 and cemented the impasse.

[82] No correspondence has been produced between Mr AJ and Mr AK in the second half of 2012, when the lawyers were corresponding about the remaining trust account funds, in which Mr AJ refers to the need for a further retainer including fee arrangements for the work involved in applying for clarifying orders.

[83] This is inconsistent with Mr AJ's submission that his retainer ended once he had explained the judgment to Mr AK, and is strongly suggestive of the fixed-fee retainer contemplating work of that nature as being, in *Gilbert* terms, a matter that "fairly and reasonably [arose] in the course of carrying out [Mr AK's] instructions [and] must be regarded as coming within the scope of the retainer".

[84] Given the extensive nature of Mr AJ's written client care and terms of engagement information, signed by Mr AK in July 2010, and the importance that Mr AJ attaches to that material, I find it surprising that Mr AJ had not at least drafted such a document for Mr AK to sign in relation to the work involved in seeking

clarifying orders. If it existed, it would be important evidence in determining the scope of the fixed-fee retainer.

Post-judgment correspondence in 2013

[85] There does not appear to have been any correspondence between the parties between 24 October 2012 and 27 May 2013, when Mr AJ sent an email to the lawyer on the other side and said:

> Quite obviously one of us is wrong with our interpretation. As I see it the Judge will be angry [if] either one of us bothers him..particularly when your client claims the funds but had not applied for further directions from the Judge.

[86] In that email, Mr AJ suggested that a third party resolve the impasse by a binding ruling, with the costs to be shared. This suggestion was not taken up by the lawyer on the other side.

[87] It is clear that on 27 May 2013 the parties had still not agreed on the division of the remaining trust account funds. For Mr AJ's part, he was by then reluctant to apply for clarifying orders because of possible judicial displeasure.

[88] The fact that Mr AJ raised, for a second time in seven months, the prospect of applying for clarifying orders but had become reluctant to do so, illustrates his awareness that the full effect of the Court's May 2012 judgment could not be implemented without formal steps being taken.

Conclusion: implied term

[89] For the above reasons, I am satisfied it was an implied term of Mr AJ's and Mr AK's fixed-fee retainer that Mr AJ was obliged to apply to the Judge for clarifying orders in relation to the final distribution of the remaining trust account funds, given that the sticking point included the meaning and effect of the vehicles agreement.

[90] Indeed, as the Committee observed in its determination, the matter could have been raised with the Judge in a memorandum setting out the issue. It is difficult to understand why Mr AJ considered, as he did in March 2015, that detailed pleadings were required. If nothing else, an initial memorandum to the Judge would have resulted in the issue either being clarified then and there, or the Judge requiring further information.

[91] But to do nothing, in my view, was a breach of the terms of Mr AJ's retainer with Mr AK and I agree with the Committee's conclusion about that.

[92] For completeness, I note and set out again an extract from Mr AJ's terms of engagement with Mr AK (the exclusion):

> **Specifically excluded**
>
> I/We agree that the following events/matters are excluded and if I/We require you to undertake them, I/We will further pay you for your time at your hourly rate:-
>
> - **Hearing required caused by me/our actions or omissions:** Any Court hearing required because of my/our actions or omissions.

[93] The portion of the judgment that has given rise to the impasse between Mr AK and his former wife about the final division of the remaining trust account funds, begins with the Judge criticising both counsel for not adequately arguing the issue of adjustments. His Honour describes his following analysis as "impressionistic" as a result.

[94] The adjustments made by the Judge included reference to the vehicles agreement, and it was over the application of the vehicles agreement, that the parties reached impasse when negotiating the final division of the remaining trust account funds. However, clarifying orders were not sought.

[95] It is arguable that the exclusion in the terms of engagement applies to the need that arose for clarifying orders. Adopting the wording of the exclusion, the Judge's criticism, although it was directed to both counsel, describes "[Mr AJ's] actions or omissions" and the impasse between the parties about that part of the judgment clearly "[requires a] Court hearing".

[96] The effect, if any, of the exclusion was not raised by Mr AK in his complaint, considered by the Committee in its decision or addressed by Mr AJ on review. For that reason, I do not propose to make a definitive finding about the effect of the exclusion. I simply note its existence and the potential for it to have had application.

[97] It is certainly not for this Office to express an informed opinion about, much less resolve, the impasse that arose between the parties and the relevance to that of the vehicles agreement. Equally, this Office is not the proper forum in which to make orders or give directions about the effect of the vehicles agreement on the adjustments that the Court ordered.

[98] However, I observe that a reasonable interpretation of the Judge's comments in the section of his judgment dealing with adjustments, is that he offset the difference between the values of the two vehicles against Mr AK's former

partner's claim for occupation rent and let matters rest at that. Such an interpretation would appear to favour Mr AK's former partner's argument as to the division of the remaining trust account funds.

[99] I accept that the issue about the division of the trust account funds did not begin to crystallise until the property sales had been completed and the net sales proceeds were in Mr AJ's trust account. Until there was a fixed amount to distribute, calculation of and discussion about respective shares was premature.

[100] Furthermore, it is not unreasonable to allow time for the lawyers to attempt to reach agreement about dividing the remaining trust account funds. Those negotiations took about two months, before breaking down on 24 October 2012.

[101] At that point, I consider that Mr AJ ought to have taken steps and sought clarifying orders from the Judge, initially at least by way of memorandum. It is reasonable to allow four weeks to complete that.

[102] In my view, Mr AJ's breach of his retainer with Mr AK arose by the end of November 2012. From that time on, his failures to take any steps aggravate the breach. I will discuss the consequences of that further below.

Stakeholder?

[103] As part of his argument that he was not required to do anything beyond continuing to hold the remaining trust account funds until agreement was reached or order made, Mr AJ has argued that he was a stakeholder of those funds and thus covered by r 10.3.2.

[104] That rule provides:

> A lawyer who receives funds on terms requiring the lawyer to hold the funds in a trust account as a stakeholder must adhere strictly to those terms and disburse the funds only in accordance with them.

[105] Mr AJ has not produced any correspondence between himself and the lawyer acting for the other party in which there was agreement that Mr AJ was to be a stakeholder in relation to the proceeds of the Court directed sales, in which he acted.

[106] However, it seems clear that Mr AJ did carry out that conveyancing work on behalf of both Mr AK and his former partner, with her consent, and that the sale

proceeds were lodged in his trust account to be distributed from there. This suggests that he was acting as a stakeholder of those sale proceeds.

[107] Mr AJ appears to argue that his status as a stakeholder is a complete answer to the complaint that he did not apply to the Court for clarifying orders. He submits that as a stakeholder, his obligations were defined by that role and limited to it. The extent of his obligation, he submits, was to hold the funds until either the parties had reached agreement, or the Court had ordered their distribution, and to only disburse them at that time.

[108] However, that obligation of stakeholder did not override or otherwise limit Mr AJ's other obligations as Mr AK's lawyer. The terms of that retainer were still to be met, provided they were not inconsistent with his stakeholder obligations.

[109] In particular, being a stakeholder of the sale proceeds did not override Mr AJ's obligation, as I have found it to have been, to advance an application for clarifying orders on Mr AK's behalf and to do that as part of the fixed-fee retainer.

Other

Unsatisfactory conduct

[110] The Committee found unsatisfactory conduct under both ss 12(a) and (b) of the Act.

[111] Section 12(a) provides that unsatisfactory conduct means:

> conduct of the lawyer … that occurs at a time when he or she … is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

[112] Section 12(b) provides that unsatisfactory conduct means:

> conduct of the lawyer … that occurs at a time when he or she … is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
>
> (i) conduct unbecoming a lawyer …; or
>
> (ii) unprofessional conduct.

[113] In relation to both ss 12(a) and (b), the Committee held that Mr AJ's conduct in refusing to apply for clarifying orders "constituted gross negligence and/or incompetence" and that his conduct "fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent

lawyer". The Committee also held that "lawyers of good standing [would clearly regard Mr AJ's conduct] as being unacceptable".[23]

[114] Whether or not the Committee was correct to describe Mr AJ's conduct as amounting to "gross negligence", is uncertain. Negligence is not referred to in either of sections 12(a) or (b).

[115] That being said, I agree with the Committee's characterisation of the conduct as falling below the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer. It seems clear from Mr AK's complaint that this is how he viewed Mr AJ's conduct, which supports the Committee's finding to that effect.

[116] I also agree with the Committee's assessment that lawyers of good standing would regard Mr AJ's conduct as being unacceptable. Retaining funds in his trust account for approximately four years against the instructions of his client to sort out the ownership of those funds, precisely meets the definition of what is unacceptable.

Section 110 of the Lawyers and Conveyancers Act 2006

[117] The Committee held that Mr AJ had "effectively breached s 110 of the Act" by failing to take steps to determine the legal ownership of the remaining trust account funds. For that breach, the Committee made a finding of unsatisfactory conduct pursuant to s 12(c) of the Act.

[118] Section 110 of the Act relevantly reads:

> **Obligation to pay money received into trust account at bank**
>
> (1) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person—
>
> (a) must ensure that the money is paid promptly into a bank in New Zealand to a general or separate trust account of—
>
> (i) the practitioner; or
>
> (ii) a person who, or body that, is, in relation to the practitioner, a related person or entity; and
>
> (b) must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs.

[119] In my view, the obligations imposed on a lawyer pursuant to s 110 of the Act — which includes an obligation to pay monies when directed by the owner of that

[23] Standards Committee determination at [22].

money — do not easily arise when there is a dispute between the owners as to how it is to be divided.

[120] The rationale for the Committee's finding that Mr AJ had breached s 110 of the Act appears to be that he did not take steps to determine the ownership of those funds so that payment could then be directed.

[121] Given my reservations about the application of s 110 of the Act to these facts, I am not persuaded that the finding of a breach of the section was appropriate. It was certainly not necessary, as Mr AJ's culpability was and is properly captured by the breaches of ss 12(a) and (b) of the Act.

[122] I therefore reverse the Committee's finding that Mr AJ has breached s 110 of the Act.

Outcome

[123] I do not accept that Mr AJ had grounds to terminate his retainer with Mr AK, on [date]. Mr AK had become increasingly concerned about Mr AJ's failure to take any steps for over three years. He had been gracious enough to allow Mr AJ opportunity to complete his period of suspension, which in fact ended on [date]; but as 2015 ended and 2016 began, Mr AK's patience had run out. This was an entirely reasonable response.

[124] Mr AJ submits that he had done all that could be expected of him by 28 September 2015, when he completed the documents necessary to seek clarifying orders, and sent them to Mr AK for comment and further information. He claims not to have received that information.

[125] Nevertheless, it is correct that in December 2015 and January 2016, Mr AK endeavoured to contact and speak to Mr AJ, by visiting his office premises. Mr AJ was unable to see him because of other work commitments and Mr AK's persistence was met with the Trespass Notice being served on him on 10 January 2016.

[126] I do not accept Mr AJ's submissions that after [date] the ball was in Mr AK's court and Mr AJ was not obliged to do anything other than wait. It is clear that Mr AK wanted to speak to Mr AJ, but was consistently rebuffed.

[127] By the time of Mr AJ's purported termination of his retainer with Mr AK, almost four years had elapsed since the Family Court delivered its judgment. I have

earlier indicated that given the various steps required to implement that judgment, it is reasonable to conclude that by the end of October 2012, the parties could not agree on the division of the remaining trust account funds.

[128] At that point, as I have indicated, it fell to Mr AJ as part of his fixed-fee retainer to apply for clarifying orders. It might have been possible to accomplish that without a formal application and supporting affidavits; a memorandum to the Judge may have provided the clarification the parties needed.

[129] To have done nothing for some further three-plus years, is inexcusable in my view. Mr AJ's brief period of suspension during 2014 provides no excuse. Mr AJ should have instructed Mr L to complete the terms of the fixed-fee retainer. If it meant Mr AJ having to fund that, then that was a consequence for him.

[130] Mr AJ has been at pains to emphasise that he was intolerably busy with other pressing client matters from approximately 2013 onwards and that this contributed significantly to his inability to take steps towards seeking clarifying orders.

[131] This is not an acceptable excuse for not completing a client retainer, as the Rules require. Mr AK's retainer cannot be compromised by Mr AJ's decision to do other work. The proper response is to decline to accept instructions if capacity has been reached.[24] That is a stark practice management issue that Mr AJ must address, lest he finds himself in a similar position in the future.

[132] By January 2016 Mr AK's frustration — indeed anger — at the lack of any action by Mr AJ, was justified. It was caused by Mr AJ's failure to do what his fixed-fee retainer required. For practical purposes, the relationship of trust and confidence which lies at the heart of every lawyer/client relationship had irretrievably broken down by the end of January 2016.

[133] It seems clear that Mr AK has not retained another lawyer to complete the work that Mr AJ should have completed. The trust funds remain in Mr AJ's trust account.

[24] Rule 4.1.

[134] The Committee's response to this was as follows:[25]

> Mr AJ ought to compensate Mr AK for the actual and reasonable costs that Mr AK incurs in instructing counsel to carry out [the task of applying for clarifying orders].

[135] I agree with this approach. It is patently clear that Mr AJ cannot now undertake this work. It is equally clear that ownership of the funds must be resolved sooner rather than later. They have been in Mr AJ's trust account since 2012.

[136] Mr AK should take steps as soon as possible to instruct a lawyer to resolve the impasse between himself and his former wife about the division of those funds. The effect of the Committee's decision, confirmed by me, is that his actual and reasonable costs for doing so, once known, are to be met promptly by Mr AJ.

Penalty

Censure

[137] The Committee censured Mr AJ, ordered him to pay a fine of $7,500 together with costs of $1,000.

[138] In *LCRO 248/2012* this Office held that:[26]

> A censure would amount to an indication from the profession that regardless of the circumstances, a lawyer must adhere to the standards of conduct required of him or her and is to be taken seriously. It is not a nominal penalty to be imposed. As noted by the High Court in *B v Auckland Standards Committee No 1,* "a rebuke of a professional person will inevitably be taken seriously."

[139] I regard Mr AJ's failure to complete his fixed-term retainer with Mr AK, as serious. Client funds are involved. The litigation ostensibly concluded in May 2012 with the delivery of the Court's decision and finality has still not been achieved. The breakdown of confidence and trust between the two is entirely Mr AJ's responsibility.

[140] I do not propose to interfere with the Committee's determination in that regard.

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[25] Standards Committee determination at [27].

[26] *LCRO 248/2012* at 11, citing *B v Auckland Standards Committee No 1 of the New Zealand Law Society* [2013] NZCA 156 at [39].

Fine

[141] I am not prepared to interfere with the fine imposed by the Committee. I acknowledge that it is at the higher end of the scale of what might be considered appropriate for conduct of this nature, but I do not regard the fine as being excessive for that conduct.

[142] For the avoidance of doubt, the Committee's order that Mr AJ pays costs of $1,000, stands.

Decision

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

(a) Modified as to the finding of unsatisfactory conduct pursuant to s 12(a) of the Lawyers and Conveyancers Act 2006 in that Mr AJ's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

(b) Confirmed as to the finding of unsatisfactory conduct pursuant to section 12(b) of the Lawyers and Conveyancers Act 2006.

(c) Reversed as to the finding of unsatisfactory conduct pursuant to s 12(c) of the Act, based upon a finding that Mr AJ had breached s 110 of the Act.

(d) Confirmed as to the imposition of a censure.

(e) Confirmed as to the imposition of a fine of $7,500.

(f) Confirmed as to the order to pay compensation to Mr AK being his actual and reasonable costs in instructing counsel to apply to the Family Court for clarifying orders.

(g) Confirmed as to the imposition of costs of $1,000.

Costs on review

[144] Mr AJ's application for review has been unsuccessful, except for my reversal of the finding of unsatisfactory conduct made pursuant to s 12(c) of the Act.

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

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

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

Enforcement of costs order

[148] Pursuant to s 215 of the Lawyers and Conveyancers Act 2006 I confirm that the order for costs may be enforced in the civil jurisdiction of the District Court.

DATED this 31st day of January 2018

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R Maidment
Legal Complaints Review Officer

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

Mr AJ as the Applicant
Mr AK as the Respondent
[Area] Standards Committee No.[X]
New Zealand Law Society