LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 88

Ref: LCRO 22/2019

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	**HT** Applicant
AND	**MK** Respondent

DECISION

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

Introduction

[1] Mr HT has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of Mr MK, at the relevant time a partner with [law firm] (the firm).

[2] Mr HT's company, BEG Limited (BEG) was a shareholder in DOT International Limited (DOT). Mr HT was a director of DOT.

[3] The firm commenced acting for DOT, BEG, and MAT Limited in 2014.[1] During 2016 Mr MK acted for DOT first, on the proposed sale of DOT's business (its assets) which did not proceed, and secondly, on the sale of BEG's shares in DOT.

[1] The firm acted on matters including a claim against a former employee of DOT, Mr JS, referred to later in this decision.

[4] On 10 March 2016, Mr MK reminded (by email) Mr HT that DOT owed $39,538.74 to the firm for outstanding fees.[2] Six weeks later on 28 April 2016, in response to Mr MK's follow up email, Mr HT expressed (by email) his lack of "confidence" with the firm "over the outstanding payments". He said DOT "unfortunately" "would have to seek other legal advice".

[5] However, within two weeks Mr HT instructed Mr MK to act on the sale of DOT's "remaining assets" to TOM Limited (TOM). On 12 May 2016, Mr MK provided his letter of engagement to Mr HT which included a fees estimate for the legal work described.

[6] As detailed later in my analysis, in early June 2016, Mr HT instructed Mr MK that SIN Limited (SIN) wanted to purchase 15,300 of BEG's shares in DOT (sale shares), with an option to purchase a further 810 shares (option shares).

[7] Having received Mr HT's instructions, Mr MK prepared, as he described, "two draft sale and purchase agreement[s]" of shares (the share sale agreement). The first, on 13 June 2016, and the second on 15 June 2016, the day before he departed for a week's holiday.

[8] During Mr MK's absence BEG as vendor, SIN as purchaser, and Mr XY, as guarantor signed a share sale agreement.[3]

[9] On 30 June 2016, Mr MK told (by email) Mr HT he would update Mr HT and DOT concerning outstanding fees.[4] He said he was "working on [BEG's] consulting agreement" for the provision of services to DOT and "the other conditions to settlement" provided for in clause 3.1 of the share sale agreement.

[10] The following day, 1 July 2016, Mr HT informed (by email) Mr MK that Mr MK's services would not be required to settle the sale.

[11] On 4 July, Mr MK provided (by email) Mr HT with the firm's invoice for fees concerning DOT's proposed sale to TOM (assets) and, BEG's sale to SIN (shares).[5] In a separate email that day, Mr MK sent Mr HT an agreement for BEG's provision of services to DOT.

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[2] Mr MK, email to Mr HT and others (10 March 2016).
[3] Mr XY was the husband of the sole director and shareholder of SIN, Mrs LN.
[4] Mr HT informed (by email) Mr MK that day that the firm "will be paid".
[5] Invoice (30 June 2016) regarding the sale of assets to TOM and shares to SIN: the fee component was $15,360 plus GST; office expenses $706.56 (including GST); total $18,370.56.

[12] DOT paid $29,671.74 to the firm on 7 July on account of outstanding fees.[6] From 12 July, Mr HT exchanged further communications (by email) with the firm about the balance of DOT's unpaid fees.

[13] On 27 July, Mr HT told (by email) Mr MK he had "a problem" with Mr MK's 30 June 2016 invoice claiming Mr MK had not done some of the work. In his response that day Mr MK explained (by email) how he had determined the fee. He asked Mr HT for instructions to prepare the other documents required by clause 3.1 for which he said there would be additional legal fees.

[14] On 5 September, Mr MK sent a further invoice to Mr HT for preparation of BEG's contract for the provision of services. He reminded Mr HT that "the contractor's agreement" had been sent to [Mr HT] "on 4 July - see attached".[7]

Complaint

[15] Unable to resolve his differences with the firm, Mr HT lodged a complaint with the New Zealand Law Society's Lawyers Complaints Service (Complaints Service) on 22 November 2017 on which he elaborated in subsequent communications to the Complaints Service.[8] He sought compensation for the losses he said he incurred caused by Mr MK's negligence in drafting the share sale agreement.

(1) Share sale agreement

(a) Errors

[16] Mr HT alleged that the share sale agreement Mr MK drafted "contained a raft of serious errors" including (a) the omission of settlement provisions, (b) the wrong numbers of sale shares, and option shares, and (c) the omission of a requirement for a shareholders' agreement.[9]

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[6] Mr MK, letter to Complaints Service (31 January 2017) at [46].
[7] Invoice (31 August 2016) regarding the sale of shares to SIN. The fee component for attendances to 31 August 2016 was $2,250 plus GST and disbursements; total $2,731.
[8] Mr HT, emails to Complaints Service (20 November 2017, 3 February 2018, 11 February 2018, and 5 March 2018, to name Mr HT's main communications).
[9] Mr HT, emails to Complaints Service (11 February 2018 and 5 March 2018).

(b) Instructions

Enquiries

[17] Mr HT claimed Mr MK failed, as instructed by him, to make enquiries about (a) SIN's ability to complete the purchase, and (b) SIN's negotiator, Mr XY.

[18] Mr HT claimed Mr MK, without such enquiry, (a) "accepted [Mr XY] as the negotiator consultant for the SIN Group", and (b) negotiated the terms of the share sale agreement with Mr XY but made "no arrangement" to "communicate" with SIN's lawyers.[10] He said he subsequently learned Mr XY had been the subject of "two fraud cases".[11]

Omissions

[19] Mr HT claimed Mr MK did not reply to his instructions on the SIN transaction contained in his 8 June 2016 email to Mr MK, and omitted details required by [Mr HT] in the share sale agreement.[12]

[20] Instead, he said on 8 June 2016 without providing him with the advice requested, Mr MK told (by email) DOT's accountant that [Mr HT] had asked Mr MK for "details of the structure of the SIN offer so we are all on the same page".

(2) Satisfaction of conditions – instructions

[21] Mr HT alleged Mr MK failed to (a) provide, or obtain the documents required by the conditions contained in clause 3.1 of the share sale agreement, and (b) "satisfy [those] conditions" thereby "jeopardis[ing]" the sale.[13]

(3) Delay

[22] Mr HT claimed that having prepared "another sale and purchase agreement" for the sale of DOT's remaining assets to TOM, Mr MK knew SIN required the share sale agreement urgently.

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[10] Mr HT, email to Complaints Service (11 February 2018).
[11] Mr HT, email to Complaints Service (20 November 2017, 11 February 2018, and 5 March 2018).
[12] Mr MK, email to DOT's accountant (8 June 2016) which set out details Mr MK said Mr HT required in the (SIN) share sale agreement. Also see Mr HT, email to Complaints Service (20 November 2017) – see my later analysis.
[13] Mr HT, email to Complaints Service (20 November 2017).

[23] Yet, he said, Mr MK went on leave without passing the file to "a senior solicitor or partner" of the firm to "follow-up" and "finalise" the "detail required to conclude the settlement" of the sale.[14]

[24] He said during the time Mr MK was on holiday, the firm "would have been able to prepare" the share sale agreement, including the required "terms and conditions" thereby "protect[ing]" BEG's and [Mr HT's] interests, and ensuring payment of DOT's creditors which included the firm.[15]

(4) Disclosure – share transfer

[25] He said Mr MK "discover[ed]" that the transfer of BEG's shares to SIN had been recorded at the Companies Office on 24 July 2016, but did not inform him, and did not contact DOT's Chief Financial Officer (CFO), Mr ZG, to ensure that the transfer had been authorised.[16]

(5) Fees

[26] Mr HT claimed the firm's fee of $21,500 plus GST was not fair and reasonable.

[27] He said the fees, for which the firm had provided an estimate, "reached $18,500 without the inclusion" of the documents required by the conditions in clause 3.1. He said the scope of work for the TOM transaction which did not go ahead, "was all inclusive $20,000".[17]

[28] Referring to Mr MK's letter of engagement for the TOM transaction, Mr HT said Mr MK "overlooked" providing him with a description of the legal work for the subsequent sale of shares by BEG to SIN.[18]

Response

[29] I refer to Mr MK's response in my later analysis.[19]

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[14] Mr HT, email to Complaints Service (11 February 2018).
[15] Mr HT, email to Complaints Service (5 March 2018).
[16] Ibid.
[17] Mr HT, email to Complaints Service (11 February 2018).
[18] Ibid., including [preparation of the] share sale agreement; reviewing read drafting and negotiating the SIN agreement.
[19] Mr MK, letters to Complaints Service (31 January 2017 and 20 April 2018).

Standards Committee

[30] The Committee delivered its decision on 11 December 2018, and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

(1) Share sale agreement – negligence claim

[31] The Committee decided that the draft share sale agreement prepared by Mr MK "contained the necessary protections in regard to payment of the purchase price". Moreover, had Mr MK "been instructed on settlement, those provisions would have been adequate to secure payment" of the amount due on settlement "in the normal course of things."

[32] In particular, the Committee stated that the share sale agreement (a) "contained standard provisions for settlement, requiring payment of the purchase price to the vendor's solicitor's trust account prior to the share transfers being released" including "proof of payment of all creditors", and (b) "entry into appropriate further documentation as a condition of settlement";

[33] The Committee explained that security for payment of the purchase price "in these situations is achieved through ensuring" payment before the "release of transfer documents" which is "usually conducted" by the parties' respective lawyers.

[34] Having noted (a) Mr MK had advised Mr HT "not to transfer the shares until the settlement funds had been received, and (b) Mr HT did not instruct Mr MK to attend to the settlement, the Committee stated "there was no way" Mr MK "could control or secure payment of the purchase price and the release of the share transfers.[20]

(2) Satisfaction of conditions – clause 3.1

[35] The Committee observed that on 1 July 2016, Mr HT told Mr MK the shares had "not yet been transferred", and [Mr HT] "was dealing with the conditions precedent" contained in clause 3.1 of the share sale agreement.

[36] In the Committee's view, although Mr MK "attempted to have these matters dealt with in the usual way", Mr HT "did not seek his assistance", and therefore Mr MK's absence on leave at that time had "not … prejudiced" Mr HT or BEG.

[20] See Mr HT's 1 July 2016 email to Mr MK in which he said Mr MK would not be required to settle the sale, and told Mr MK that SIN had not been given a share transfer.

(2) Fees – fair and reasonable

[37] The Committee stated that Mr MK's fee of $21,500 plus GST "appeared at first to be at the high end of the scale of the work involved", but determined the fee was fair and reasonable.

[38] In reaching that conclusion the Committee noted that Mr MK's fee estimate, contained in Mr MK's letter of engagement for the proposed sale of DOT's assets to TOM was $12,000-$15,000 plus GST, yet comprised approximately $6,500 of Mr MK's fee of $21,500 plus GST for both the TOM, and SIN transactions.

Application for review

[39] Mr HT filed his application for review on 8 February 2019 in which he further elaborates on his complaint allegations. He identifies, from his perspective, errors in the Committee's decision. He says although the Committee stated it had "reviewed the pertinent parts" of the firm's file, it had not reviewed the full file. He repeats his request for "recompense" for his loss he says was caused by Mr MK's negligence.

(1) Retainer – instructions, due diligence

[40] He says Mr MK incorrectly made provision for Mr XY, who was not a shareholder and director of SIN, the purchaser, to sign the share sale agreement, and failed to include, as instructed, Mr XY's guarantee of the purchaser's payment of $375,000 on settlement.[21]

[41] He repeats his claim that Mr MK did not question Mr XY's authority to sign the share sale agreement, or check on the worth of Mr XY's guarantee.

(2) Share sale agreement – preparation

(a) Share numbers

[42] Mr HT says the Committee "ignored or did not appreciate" Mr MK's negligence in recording the wrong numbers of sale shares, and option shares. He says that error led to Mr XY's dismissal of DOT's CFO, Mr ZG.[22]

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[21] Mr HT, email to Mr MK (13 June 2016).
[22] Mr HT says Mr ZG had challenged Mr XY's ability to register the share transfers "online" with the Companies Office.

[43] He says the consequences of Mr MK "misrepresent[ing] the ownership" of DOT, which was "no longer trading", were that Mr XY (a) was able to "strip" DOT's assets, (b) delay the Companies Office's investigation into the share transfer, and (c) enable the former DOT employee, Mr JS, who was accused of misappropriating money from DOT and against whom charges had been laid by the police, reaching a settlement with DOT.[23]

(b) Instructions – agreement terms

[44] He repeats that Mr MK did not, as instructed by him on 8 June 2016, include in the share sale agreement provision for BEG to retain the claim against Mr JS.

[45] He refers to Mr XY's 15 June email to Mr MK in which Mr XY said he would "be providing personal guarantee on the BEG [$200,000] loan", but Mr MK did not include a guarantee in the share sale agreement.

[46] He says he was "unaware" of the "further [second] draft" of the share sale agreement forwarded by Mr MK to Mr XY on 15 June which he says did not include the amendments he asked Mr MK to make on 8 June.

(3) Conditions (documents) – clause 3.1

[47] Mr HT explains that on 15 June 2016 Mr MK (a) told (by email) Mr XY [Mr MK] was "preparing the document[s] necessary to satisfy the conditions" in clause 3.1 "including the 5 year consultancy agreement", and (b) asked Mr XY, for settlement purposes, for the name of Mr XY's lawyer.

[48] He says although Mr XY did not provide Mr MK with the name of [Mr XY's] lawyer, Mr MK "continued to negotiate directly with [Mr] XY".

(4) Delay

[49] Mr HT repeats that (a) on 1 June 2016, pending receipt of SIN's offer for the purchase of BEG's shares, Mr MK knew the proposed sale of DOT's business to TOM was "still on the boil", and (b) on 12 June he asked Mr MK for the share sale agreement "ASAP".[24]

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[23] As noted earlier, the firm had acted for DOT on the claim against Mr JS.
[24] Mr HT, emails to Mr MK (1 and 12 June 2016).

[50] He repeats knowing the matter was urgent, Mr MK went on leave from 16 June without referring the matter to another member of the firm.

(5) Settlement

[51] Mr HT says Mr MK ought to have "recommend[ed]" BEG "not to proceed with the Agreement until the settlement date had been set".

[52] He refers to Mr MK's 30 June 2016 question (email) to Mr XY how DOT's creditors will be "paid on completion" so "we can progress to settlement". He claims the fact Mr MK did not send this email to him as well throws doubt on the Committee's conclusion that [Mr HT] "attempted to conduct settlement without the assistance of the solicitors".[25]

(6) Fees

[53] Mr HT repeats that the other law firm he consulted supported his view that Mr MK's fees were not fair and reasonable. He says the firm's fees were included in the list of creditors – contained in the share sale agreement – which on settlement SIN, the purchaser, was required to confirm that the firm had been paid.

Response

[54] Mr MK says Mr HT's application for review does not include any new information.[26]

[55] In support of the Committee's finding that Mr HT's allegations "were unsubstantiated", Mr MK says the share sale agreement he drafted "contained the necessary protections" for settlement. He says had Mr HT instructed him to attend to settlement, the share sale agreement was "adequate to secure payment for Mr HT's benefit in the normal course".

[56] He submits it was to Mr HT's "detriment" that SIN "urg[ed]" Mr HT not to instruct him to settle the transaction.

[57] He says he did not "see any reason to make any additional comment" to his submissions to the Complaints Service.

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[25] Standards Committee's decision at [16].
[26] Mr MK, email to LCRO (25 February 2019).

Review on the papers

[58] In accordance with the agreement of the parties, this review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

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

Nature and scope of review

[60] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[27]

> … 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.

[61] More recently, the High Court has described a review by this Office in the following way:[28]

> 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

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

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

[62] 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

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

Scope of retainer – instructions, due diligence

(a) When preparing the share sale agreement did Mr MK carry out Mr HT's instructions. What enquiries, if any, did Mr HT ask Mr MK to make?

(b) Did Mr MK act competently when preparing the share sale agreement? In particular, did he omit any matters, or make any errors?

Delay

(c) Did Mr MK delay in his preparation of the share sale agreement?

Settlement

(d) Did Mr HT instruct Mr MK to draft the documents required by the conditions in clause 3.1 of the share sale agreement? If so, what documents did Mr MK prepare?

(e) Did Mr HT instruct Mr MK to settle the sale? If so, did that include registration of the transfer of shares from BEG to SIN?

(f) Did Mr MK promptly disclose to Mr HT all information [Mr MK] had or acquired that was relevant to the transfer of BEG's shares to SIN?

Fees

(g) Were Mr MK's fees invoiced to DOT, for legal work in respect of the proposed sale of DOT's remaining assets to TOM, and the sale of BEG's shares in DOT to SIN, fair and reasonable?

Analysis

(1) Scope of retainer – instructions, due diligence – issue (a)

(a) Parties' positions

[64] Mr HT claims Mr MK failed to (a) make enquiries about (i) SIN's ability to complete the purchase, and (ii) SIN's negotiator, Mr XY, and (b) ascertain the name of SIN's/Mr XY's lawyer.

[65] Mr MK says Mr HT did not instruct him to undertake "due diligence of SIN and Mr XY". He says in his experience, it would be "unusual" for a lawyer to do so unless "specifically requested".[29]

(b) Chronology

[66] To provide context for consideration of this aspect of Mr HT's complaint, I refer to the communications, largely between Mr HT and Mr MK between mid-May 2016, the date of Mr MK's letter of engagement to Mr HT concerning the TOM transaction, and 15 June 2016 when Mr MK provided Mr HT with the second version of the share sale agreement.

[67] Having been requested by Mr HT to act for DOT on the sale of DOT's remaining assets to TOM, on 12 May 2016 Mr MK provided Mr HT with his letter of engagement, accompanied by the firm's "Client Engagement Agreement".[30]

[68] Mr MK says he agreed to act on that matter contingent on Mr HT guaranteeing payment of DOT's unpaid fees. He described the "[s]cope of [legal] work", for which he said he would have "overall responsibility".

[69] He estimated the firm's fees for that work would be "approximately NZ$12,000 to $15,000 (plus GST and disbursements, if any)". He says he corresponded with TOM's lawyers about the terms of the proposed agreement.

[70] However, on 1 June Mr HT told Mr MK he "expect[ed] a firm offer today" for the sale by BEG of its shares in DOT to SIN, but would "keep the pot boiling with TOM" in the meantime. He said Mr XY was SIN's "current negotiator", and asked Mr MK to "[p]lease check if you can".

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[29] Mr MK, letter to Complaints Service (20 April 2018).
[30] Also provided to Mr KM and Mr ZG, general manager, and CFO respectively of DOT.

[71] Having forwarded SIN's "indicative offer" to Mr MK on 2 June 2016, five days later on 7 June, Mr HT asked Mr MK whether [Mr MK] had "looked at the agreement". He asked how to "handle the JS claim regarding the [i]ndebtedness [c]lause".

[72] In response that day, Mr MK told Mr HT that SIN's proposed agreement "need[ed] a lot of work". He asked whether to proceed with the TOM transaction, or the SIN transaction. Mr MK did not send a letter of engagement to Mr HT/BEG for the SIN transaction.

[73] As noted later in further detail, it appears Mr HT, on 8 June, provided verbal instructions on the share sale agreement terms, which Mr MK recorded in an email that day to DOT's accountant, and Mr HT. Later that day Mr HT raised (by email) a tax issue with Mr MK and DOT's accountant.[31] He provided further instructions (by email) to Mr HT on 13 June (9.41am), and on 14 June.

[74] On 15 June, Mr XY informed (by email) Mr MK, and Mr HT that Mr XY would be providing a guarantee of SIN's obligations as borrower of $200,000 – part of the sale price for the shares – from BEG.

[75] None of those communications mention "due diligence" enquiries of SIN or Mr XY. Mr MK provided drafts of the share sale agreement to Mr HT on 13, and 15 June 2016.

(c) Professional rules

[76] To recap, this aspect of Mr HT's complaint concerns the scope of, and the nature of Mr HT's instructions to Mr MK to prepare the share sale agreement. In particular, as described by Mr MK, whether he was instructed by Mr HT to undertake "due diligence" of SIN, and Mr XY.

(i) Retainer

[77] A "retainer" is the agreement or contract between a lawyer and client for the provision of legal services by the lawyer to the client. Rule 1.2 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) describes "retainer" 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.

[31] Shareholders loan with an ability to convert the loan to shares.

[78] Although not defined in the Act or the Rules, in the context used in r 1.2 and in a number of the rules, a "client" is the recipient of legal services. A "retainer" has been described as being: [32]

> … central to various aspects of the lawyer-client relationship. Fundamentally, it identifies the client and prescribes the services expected of the lawyer. In doing so it determines upon whose instructions the lawyer acts, the scope of the lawyer's authority in carrying out those instructions and the scope of the lawyers' duties.

[79] For evidentiary purposes, it is preferable that a retainer, to be enforceable, be in writing.[33] It is also important to note that "… [m]atters which fairly and reasonably arise in the course of carrying out those instructions must be regarded as coming within the scope of the retainer".[34]

(ii) Instructions

[80] Also relevant to this aspect of Mr HT's complaint is the nature of Mr HT's instructions.

[81] With limited exceptions, a lawyer risks a complaint from a client with a prospect of a disciplinary response if the lawyer does carry not out the client's instructions.[35] If the lawyer concerned is unsure about the client's instructions then "… it is incumbent on the lawyer to obtain clarification of those instructions. The lawyer may not proceed on an assumption the client agrees to a certain course of action".[36]

[82] A lawyer must respond to a client's inquiries in a timely manner, and disclose to his or her client information that is relevant to the retainer. A lawyer must also take reasonable steps to ensure that the client understands the nature of the retainer, keep the client informed about progress, and consult the client about steps to be taken to implement the client's instructions.[37]

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[32] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [3.05], and [5.25].
[33] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.4]. Lawyers must provide their clients with information on the principal aspects of client care and service, including the basis of charging, in advance of commencing legal work on a retainer: see rr 3.4, 3.5, 3.6 of the Rules in respect of lawyers other than barristers sole, and rr 3.4A, 3.5A, 3.6A of the Rules in respect of barristers sole.
[34] *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 537.
[35] *Ethics, Professional Responsibility and the Lawyer*, above n 33 at [10.3].
[36] At [10.3]. See r 1.6 of the Rules as to the manner in which a lawyer must provide information to a client, and see discussion in *Sandy v Kahn* LCRO 181/2009 (December 2009) at [38].
[37] Rules 7, 7.1.

(iii) Discussion

Mr HT

[83] Mr HT says without enquiry, Mr MK "accepted [Mr XY] as the negotiator consultant for the SIN Group". He claims Mr MK negotiated the terms of the share sale agreement with Mr XY, yet made "no arrangement" to "communicate" with SIN's lawyers.[38]

[84] He explains that Mr XY's wife, Mrs LN was "the sole director and 100% owner of the SIN Group". He claims Mr MK neither ascertained whether Mr XY had Mrs LN's consent to negotiate the share sale agreement terms, nor asked to see a SIN minute appointing Mr XY to that role, or as an alternate SIN director.

[85] In addition, he says the share sale agreement did not contain an acknowledgement that Mrs LN obtained independent legal advice before (a) "authorising" the share sale agreement, and (b) Mr XY provided his guarantee.[39]

[86] Concerning SIN itself, Mr HT says Mr MK did not obtain an "assurance or confirmation" from SIN's financier, that SIN had funding, including the amount to repay DOT's creditors, for the purchase.[40]

Mr MK

[87] Mr MK explains he advised Mr HT at the outset that Mr XY, who was Mr HT's contact at SIN, was neither a shareholder nor a director of SIN.

[88] He says in response to his request for the name of SIN's lawyer "a number of times", Mr HT told him SIN was "not using solicitors for the transaction". Referring to Mr HT's 1 July 2016 email to him, he says he had "some concern" SIN did not instruct a lawyer which Mr HT had "ignored". He says Mr HT "was adamant [Mr HT] wished to continue" with that approach.

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[38] Mr HT, email to Complaints Service (11 February 2018).
[39] Mr XY, email to Mr MK (15 June 2016): 12:45 PM – the share sale agreement "was OK"; Mr MK, email to Mr XY (15 June 2016): 1:42 PM – confirming the requirement for Mr XY's guarantee of BEG's loan of $200,000 to SIN.
[40] Mr HT, email to Complaints Service (11 February 2018).

(iii) Consideration

SIN / Mr XY

[89] When assisting a client with preparations for the sale of a business, or shares in a company, the lawyer concerned may be instructed by the client to undertake "due diligence" enquiries on legal matters, and possibly commercial aspects, concerning the client's business, or the business of the company in which the client holds shares.

[90] This may include advising on the client's capacity to enter into the transaction, enquiring into the nature of the client's assets, advising on steps to be taken concerning charges over business assets, or the company as applicable. It may also include advising on the effect of commercial contracts (including premises leases) to which the client (or the company in which the client holds shares) is a lessee.

[91] As noted earlier, Mr MK did not, as he had done for the TOM proposal, send a letter of engagement to Mr HT/BEG for the SIN transaction in which he described the legal work.

[92] Depending on the scope of the lawyer's instructions, the lawyer may be asked to work with and assist the client's financial and other professional advisers with their enquiries.

[93] However, unless specifically instructed by the client, enquiries about the purchaser may be of a more routine nature. This may include a search of the purchaser, if a company, at the Companies Office.

[94] In the normal course, it could be expected that inquiries extending to a purchaser's ability to complete the transaction would be undertaken by the purchaser, for the purchaser's benefit, with the assistance of the purchaser's financial advisers, and lawyer, as required. Whether a vendor wished to make such enquiries would depend on the particular circumstances of each case.

[95] Although Mr HT claims he asked Mr MK to make enquiries about SIN's ability to complete the purchase, as I have noted, his request for details about SIN appears to be confined to his 1 June 2016 request to "Please check if you can" SIN – "business consultants and accountants" – with reference to a website, and Mr XY – "business development manager …".

[96] It could also be expected that had Mr HT, an experienced businessman, wanted details of SIN's financial position, he would have provided specific instructions, possibly

through Mr MK, for [Mr HT's] accountant/financial advisors to obtain and review that information.

[97] Mr MK says he advised Mr HT at the outset that Mr XY was neither a shareholder nor a director of SIN. No evidence has been produced that Mr HT requested any further information about SIN or Mr XY. No such request appears in the subsequent emails, produced and referred to above, exchanged by Mr HT and Mr MK.

SIN's / Mr XY's lawyer

[98] On 15 June, shortly before providing his second version of the share sale agreement to Mr HT and Mr XY that day, Mr MK asked (by email) Mr XY (and Mr HT) for the "contact details of [Mr XY's] solicitor" to "arrange settlement".

[99] Mr MK asked (by email) Mr HT again on 27 June, and on 30 June.

[100] Later on 30 June Mr XY told (by email) Mr HT he would prepare the contract of service in favour of BEG, and not to "waste [Mr HT's] money" on Mr MK.

[101] From my analysis of the information produced on this aspect of Mr HT's complaint I do not consider Mr HT has proved to the standard required, namely, on the balance of probabilities, Mr MK's retainer extended to requiring Mr MK (a) to make enquiries about SIN's ability to complete the purchase, and (b) to make enquiries other than he did about SIN's negotiator, Mr XY.[41]

(2) Share sale agreement – preparation – issue (b)

(a) Negligence claim

(i) Parties' positions

[102] Mr HT says Mr MK was negligent in drafting the share sale agreement which contained "a raft of errors", in particular (a) no "protective measure[s]" to "ensure" settlement, and (b) the number of sale shares, and option shares.[42] He claims he suffered loss as a consequence.

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[41] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [26].

[42] "[P]rotective measure[s]" to "ensure" settlement – payment of the purchase price, and completion of the documents required by the conditions in clause 3.1 which made provision for the contract for services in favour of BEG.

[103] Mr MK denies (a) his, or the firm's advice to BEG, and Mr HT was negligent, and (b) he was asked by the firm to resign due to his "shortcomings, errors and legal advice" to BEG.[43]

(ii) Discussion

[104] Mr HT says Mr MK displayed an "inability to be challenged and grasp the need for commercial mutually acceptable terms and take instructions", and instead, wanted to "pursue [Mr MK's] own preferences".

[105] Referring to fees owed to the firm by DOT in respect of DOT's claim against the former employee (Mr JS), Mr HT says Mr MK's desire to protect the firm's "investment" led to BEG selling its shares to SIN rather than DOT selling its remaining assets to TOM.[44]

[106] He says he regards Mr MK's question on 30 June 2016, before the share sale agreement was signed, "how are the creditors going to be paid", as Mr MK "has[s]ling]" for the firm "to be paid".[45]

[107] A lawyer owes his or her client a duty of care in tort (a civil wrong), as well as in contract. For that reason, if found to be negligent, the lawyer may be liable in both tort and contract. A cause of action in negligence may lie if the lawyer does not achieve the standard of competence "expected by law".

[108] Any action in contract or negligence brought by a client, claiming loss, against his or her lawyer is heard by the courts before whom evidence, frequently including expert evidence, can be tested by cross examination. The disciplinary process before a Standards Committee, or this Office on review, which involves an inquiry rather than a trial, does not sufficiently allow for the testing by cross-examination of evidence as is required for the just resolution of significant civil disputes.

[109] The contract, or retainer, between the lawyer and client, referred to earlier, which contains "the scope of the lawyer's duty of care", has been described as "substantiat[ing] the existence of the relationship that has given rise to that duty".[46]

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[43] Mr MK, letter to Complaints Service (31 January 2017).
[44] Presumably, a reference to the fees owed by DOT to the firm. Mr HT says DOT's claim against Mr JS had "little to do" with his complaint other than to highlight "DOT's [and] BEG's payment record".
[45] I observe that this statement by Mr HT conflicts with his reference to "our signed agreement" in each of his 24 June 2016 emails to Mr XY and Mr MK.
[46] *Lawyers' Professional Responsibility*, above n 32 at [5.05] and [5.10].

[110] It is the role of a Standards Committee, this Office on review, or the Lawyers and Conveyancers Disciplinary Tribunal, as applicable, to inquire into whether the conduct of the lawyer concerned fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[47]

[111] Standards Committees, and this Office have frequently stated that the complaints process is not an alternative to court proceedings. However, if arising out of an action in negligence brought by a client against a lawyer there are questions to be answered about the lawyer's competence, then the client may still lay a complaint with the Complaints Service.

[112] Where a Standards Committee, or this Office after hearing such a complaint, or review, considers there may have been misconduct by a lawyer, then the Disciplinary Tribunal, on a referral of the matter to it, may consider that the lawyer has been negligent or incompetent "of such a degree or so frequent as to reflect on [the lawyer's] fitness to practice or as to bring [the] profession into disrepute".[48]

[113] It follows that any claim in negligence brought by Mr HT against Mr MK will necessarily require consideration by a court including the hearing, and resolution of disputed facts.

(b) Settlement process – protective measures

(i) Parties' positions

[114] Mr HT claims that one of the errors Mr MK made was to omit from the share sale agreement "protective measure[s]" to "ensure" settlement.

[115] Mr MK says clause 4.2 of the share sale agreement he drafted did not require BEG to transfer the shares to SIN until payment of the purchase price by SIN to the firm's trust account. He says Mr HT's instructions to prepare a share sale agreement did not extend to negotiation of its terms.

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[47] Section 12(a) of the Act – unsatisfactory conduct: "…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"; see also r 3 of the Rules: "[i]n 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".

[48] Sections 152(2)(a) and 241(c) of the Act.

(ii) Discussion

[116] From my reading of both of Mr MK's versions of the share sale agreement, clause 4 required that on "the completion date" (a) the purchaser, SIN, must pay the purchase price ($375,000 plus GST, if any, in cash, and the balance of $200,000 by a contemporaneous loan from BEG to SIN), and (b) upon payment BEG, would provide to SIN, amongst other things, a transfer of the sale shares.

[117] Although discussed in more detail later in my analysis, if, following receipt of both versions of the share sale agreement, and before a share sale agreement was signed, Mr HT had any concerns, queries or comments to make about those documents, it was open to him to respond to Mr MK as he did on receipt of Mr MK's first, 13 June, draft.

[118] Equally, during Mr MK's absence from the office from 16 June 2016 to 24 June 2016, Mr HT could have contacted the firm and asked to be referred to another of the lawyers he had worked with and knew.

[119] Contrary to Mr HT's allegation, clause 4.2, which was contained in each document, included what the Committee described and could be expected as "standard provisions for settlement". Mr HT has not made out his claim that Mr MK omitted a process for settlement of the transaction from the draft share sale agreement.

(c) Share numbers

(i) Parties' positions

[120] Mr HT also claims Mr MK mistakenly recorded the number of sale shares, and option shares in the share sale agreement. He says Mr MK knew BEG was selling 51% of its shares in DOT to SIN.[49]

[121] Mr MK categorises his misdescription of the numbers of sale shares – 1,530 instead of 15,300 – and option shares – 1,470 instead of 14,700 – as "a simple drafting error", namely, the omission of '0' on the end of each number".

(ii) Discussion

[122] By claiming that each of Mr MK's two versions of the share sale agreement were not marked as drafts, Mr HT contends, in effect, the 15 June 2016 version, which it

[49] Mr HT says, Mr MK's error "the omission of a zero" – in the number of sale shares, and option shares still did not prevent the subsequent "fraud[ulent] transfer" of BEG's shares to SIN.

appears BEG, SIN, and Mr XY signed, could be relied upon for signature, and the error reflects adversely on Mr MK's competence.[50]

[123] Mr HT says Mr MK did not mark either version of the share sale agreement as a draft, or say it was a draft. He says Mr MK made "no suggestion" [Mr MK] "would discuss" the document "on his return [from holiday] for further instructions". He says when later requesting a copy of the signed share sale agreement Mr MK did not refer to it as a "draft".

[124] Mr HT says he suspects Mr MK, knowing he "would be absent on vacation", described both versions as drafts. In Mr HT's view, that gives "some possible [credence]" to Mr MK's statement that Mr MK "had not heard [back] from [Mr HT]".

[125] Mr MK says, as instructed by Mr HT, on 15 June he sent a second draft of the share sale agreement to Mr HT (and Mr XY) for review. He says he told Mr HT he would be going on holiday the next day, and "offered to meet" on his return "to address any residual matters in the agreement".

[126] He says while on holiday he was in contact with his office during which time he did not receive any communication (telephone or email) from Mr HT. He says on return he "was surprised" to learn the draft agreement had been signed. He says despite his requests on 24 June, he was not provided with a copy. He says it would have been to BEG's advantage had the lower number of shares in DOT been transferred instead of all BEG's shares which subsequently occurred.

[127] It is helpful if the client's lawyer, when sending a draft document to a client, also provides a document summary, or identifies issues in respect of which the lawyer seeks clarification. In that regard, I observe that Mr MK's 13 June email highlighted for Mr HT that on settlement BEG would lend $200,000 (of the sale price of $575,000) to SIN. Mr MK addressed that issue in his second, 15 June, draft.[51]

[128] However, even though Mr MK clearly stated in both his 13, and 15 June emails, which accompanied his two versions of the share sale agreement, that each version was a draft, it could be expected he would have taken more care with important detail in the share sale agreement such as the share numbers.

[129] It could also be expected he would have passed the SIN file to a colleague to progress with Mr HT during [Mr MK's] absence, as required by Mr HT.

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[50] Rule 3 of the Rules; s 12(a) of the Act – referred to above.
[51] Clause 4.1(b) and (c) of Mr MK's second, 15 June 2016, version.

[130] Having said that, Mr MK expressly stated in his 15 June email to Mr HT that the second, 15 June, draft was "subject to [Mr HT's] review". He invited Mr HT "to meet to address an[y] residual matter" on his return to his office from holiday on 23 June.

[131] Just as Mr HT provided feedback to Mr MK on the first draft, equally having read the second draft as requested by Mr MK, it was open to Mr HT to telephone the firm. Finding Mr MK absent from the office, Mr HT could have asked to speak with another partner or other lawyer he knew, for guidance and assistance as appropriate.

[132] Instead, as appears from the above chronology of events, Mr HT proceeded to have a share sale agreement signed by BEG, SIN, and Mr XY without further input from the firm.

[133] In these circumstances, I do not consider Mr MK's error in mis-stating the share numbers in his drafts of the share sale agreement calls for a finding that he failed to act competently on that particular matter, or, that his conduct fell below the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

(d) Instructions – other agreement terms

(i) Parties' positions

[134] Mr HT claims Mr MK did not reply to his 8 June 2016 email containing instructions for Mr MK on the SIN transaction. Instead, he says, that day, without providing him with the advice requested, Mr MK told (by email) DOT's accountant that Mr HT had asked [Mr MK] to provide "details of the structure of the SIN offer so we are all on the same page".[52]

[135] Mr MK says that during his absence Mr HT could have "sought assistance" from Mr RL who was advising Mr HT on DOT's claim against Mr JS. Alternatively, from two partners and an associate in the firm's [city] office who had previously acted for Mr HT on DOT matters.

(ii) Mr HT's instructions

[136] Mr HT's instructions to Mr MK on the content of the proposed share sale agreement were also contained in their emails exchanged between 15 May 2016 and 15 June 2016, a number of which I have already referred to concerning the retainer issue.

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[52] As I have noted, Mr HT appears to have provided verbal instructions to Mr MK on 8 June 2016.

[137] Having forwarded SIN's proposed agreement to Mr MK on 2 June, Mr HT followed up on 7 June. He asked Mr MK (a) whether [Mr MK] had "looked at the agreement", and (b) how to "handle the JS claim regarding the [i]ndebtedness [c]lause". He suggested (c) the "fraud" aspect of DOT's claim against Mr JS "could be assigned" to him, and the "[c]ivil claim to DOT".

[138] Again, as noted earlier, in response that day Mr MK asked Mr HT whether to proceed with the TOM transaction, or the SIN transaction.

[139] In his 8 June email to Mr HT, and DOT's accountant, Mr MK recorded "details" of the SIN offer" obtained from Mr HT that day: (a) SIN was to pay $572,000 to BEG for 51% of the shares in DOT, and an option to acquire a further 27% at any time in the future; (b) BEG would contract with SIN to provide services to DOT for 5 years, at $60,000 per annum with Mr HT "act[ing] as a director and consultant to DOT"; (c) intercompany loans would be cancelled; (c) BEG would retain the rights to DOT's claims against Mr JS; and (d) fees owing to the firm by DOT would be paid.

[140] Mr MK said he would prepare a share sale agreement "when SIN has finalised their offer". He recorded Mr HT's instructions not to do any further work "until the SIN offer is accepted [by BEG] in principle".

[141] In his email response that day, Mr HT asked Mr MK and DOT's accountant whether, to enable DOT to repay creditors, a loan by DOT shareholders to DOT with an ability to convert that loan into shares would "work".

[142] On 12 June, Mr HT told Mr MK that SIN had "requested" preparation of "the agreement … ASAP". He said SIN's draft agreement contained "the essentials". He asked Mr MK to "prepare a final agreement". He said SIN's "cash will be available as soon as [SIN] sign".

[143] Mr MK replied (by email) half an hour later "will do". He said the firm "still require[d]", as "discussed", "security" for unpaid fees. He reminded Mr HT he would be away from Wednesday afternoon", 15 June, and would "speak" with Mr HT the following day, 13 June.

[144] Mr HT provided further detailed instructions to Mr MK on 13 June. He said (a) $200,000 of the purchase price of $575,000 paid by SIN would be "contemporaneously loan[ed] back" to SIN, guaranteed by Mr XY. He asked (b) whether Mr MK recommended "a Bill note", or "promissory note", (c) whether BEG, so as not to lose tax losses, could retain 49% of the shares in DOT redeemable on Mr HT's death if not

transferred. He said (d) there would be no guarantees given in respect of DOT's leases, and financier. He again referred (e) to BEG's consultancy (contract for services).

[145] He referred to "two tricky matters to cover", (a) assignment of the claim against Mr JS, and (b) the intercompany loans issue. He asked for Mr MK's "thoughts" on the latter

[146] Later on 13 June, Mr MK provided (by email) his first draft of the share sale agreement to Mr HT.

[147] In two subsequent emails that day, Mr MK queried "how the creditors of DOT [would] be paid at completion". He said he had provided for that "as an obligation" on SIN, as purchaser. He queried Mr HT's instructions that "only specify a purchase price of $575,000, of which only $375,000 is being paid to BEG …"

[148] The following day, 14 June, Mr HT complimented (by email) Mr MK "certainly ha[ving] done a thorough job". He asked a number of questions about the content of the draft agreement including whether to include a requirement on SIN that "future business opportunities will be offered" to DOT. He said Mr KM, DOT's GM, would supply the list of creditors, and attend to the firm's request for payment of outstanding fees.

[149] He said DOT's accountants would provide a copy of the signed share sale agreement to the IRD "to pave the way for the negotiation of a reduced settlement …".

[150] On 15 June, Mr MK told Mr HT and Mr XY he was "preparing the documents" required by clause 3.1 (conditions) of the share sale agreement, including BEG's "5 year consulting agreement". He asked for Mr XY's solicitor's "contact details" to "arrange settlement", and when settlement was expected.

[151] Mr XY informed (email) Mr MK, and Mr HT, that [Mr XY] would be providing a personal guarantee for the loan component of the purchase price. In response, Mr MK again stated "will do", and asked for Mr XY's "full name and contact address.

[152] Soon afterwards that day Mr MK provided a second draft of the share sale agreement to Mr HT (and Mr XY) for review. He reminded Mr HT he would be leaving the following day for a holiday returning on 23 June. He "offer[ed] to meet" on his return "to address an[y] residual matter" in the agreement.[53] The share sale agreement was signed during Mr MK's absence.

[53] Also provided to SIN's contact, Mr XY.

(iii) Discussion

Terms of share sale agreement

[153] I observe that a number of the matters covered in the parties' communications I have referred to were included in Mr MK's second, 15 June, version of the share sale agreement. Namely, (a) the conditions in clause 3.1 which required a shareholders' agreement, (b) release of BEG's and Mr HT's guarantees, (c) the loan by BEG to SIN, (d) BEG's contract for services, (e) written confirmation from SIN about payment of DOT's's creditors, and (f) Mr XY's guarantee.

[154] As I have noted, Mr MK's 13 and 15 June 2016 emails to Mr HT made it clear in that each version of the share sale agreement sent to Mr HT on those days were drafts.

[155] Mr MK specifically stated in his 15 June email that his second draft "reflect[ed] [his] understanding of the transaction as discussed" with Mr HT but was subject to Mr HT's "review". He reminded Mr HT he would be "out of the country" from that day "until Thursday, 23rd June", and "would be happy to meet to address an[y] residual matter [on his] return".

[156] Back in his office on 24 June, Mr MK found out that a share sale agreement had been signed. Twice that day he asked Mr HT for a copy of the agreement.

[157] If, as Mr HT later claimed, Mr MK had misunderstood Mr HT's instructions by omitting items, or including matters not required, it was for Mr HT, who Mr MK specifically asked to review the second 15 June draft, to provide feedback to Mr MK.

[158] Mr HT did not respond to Mr MK before [Mr HT] had the share sale agreement signed. In these circumstances, I do not consider that any adverse disciplinary consequences arise for Mr MK concerning this aspect of Mr HT's complaint.

Mr MK's holiday

[159] Lastly, concerning this aspect of Mr HT's complaint, Mr HT contends Mr MK was at fault for not referring him to a colleague during [Mr MK's] holiday from and including 16 June to 23 June.

[160] I consider the preferable course would have been for Mr MK to have arranged for the file to be handled by a colleague during his absence. It would have been both courteous, and professional of him to do so.[54]

[161] However, having been told by Mr MK that [Mr MK] was going on holiday, it was open for Mr HT to ask Mr MK for referral to a colleague in order to advance the matter, as required by Mr HT, during Mr MK's absence.

[162] Instead, as is evident, Mr HT proceeded to act on Mr MK's second draft by having it signed without query, feedback or comment to Mr MK as invited by Mr MK on 15 June.

[163] For these reasons, on balance I do not consider Mr MK's conduct concerning this aspect of Mr HT's complaint requires a disciplinary response.

(3) Delay – issue (c)

(a) Parties' positions

[164] Mr HT claims Mr MK did not respond to [Mr HT's] request on 12 June 2016 to prepare the share sale agreement "ASAP". He says Mr MK knew SIN required the share sale agreement prepared urgently. He says having prepared the second draft by 15 June 2016, Mr MK further contributed to the delay by going on holiday the next day without handing the matter to a colleague to progress.

[165] Mr MK says he told Mr HT in advance that he would be taking a holiday. He says he reminded Mr HT on 12 June, and again on 15 June when providing the second draft to Mr HT. At the time, he says he considered the share sale agreement was "still in negotiation", and he "offered to meet all parties" on his return "to address an[y] residual matter".

(b) Discussion

[166] This issue also concerns the parties' communications and interactions between 15 May 2016 and 15 June 2016.

[167] Expressed in terms of the relevant professional rules, Mr HT contends Mr MK did not act in a timely manner, or delayed carrying out Mr HT's instructions.[55] In effect, Mr HT claims Mr MK, having received SIN's "indicative offer" from Mr HT on Thursday

[54] Rule 3 – "A lawyer must at all times treated client with respect and courtesy …"; r 10 – "a lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings".
[55] Rules 3, and 3.3.

afternoon, 2 June, ought to have responded earlier than he did on the following Tuesday, 7 June.

[168] He says Mr MK had a "professional Cavalier approach" towards him/BEG, who were "expected to await" Mr MK's return from holiday "to complete a $1.2 million transaction" that ultimately "failed" with "consequenc[es] to the [firm's] reputation".

Timeline

[169] Mr HT told Mr MK on Wednesday, 1 June he wanted to keep the proposed assets sale to TOM "on the boil" pending receipt of SIN's offer for the purchase of BEG's shares. He provided SIN's "indicative offer" to Mr MK the following day.

[170] Mr MK told Mr HT on Tuesday, 7 June, that the SIN agreement required "a lot of work". He asked Mr HT which of the two transactions – TOM or SIN – Mr HT required him to work on.

[171] The following day, 8 June 2016, on Mr HT's instructions to review SIN's proposal, Mr MK provided to both DOT's accountant, and Mr HT "details of the structure" of SIN's offer. He said he would prepare a share sale agreement "when SIN has finalised their offer" noting Mr HT's instructions not to do any further work in the meantime.

[172] That afternoon Mr HT asked DOT's accountant, and Mr MK whether [Mr HT's] proposal to deal with tax losses "[w]ould … work". In that regard, I observe that it is reasonable to assume that because Mr MK had, in his letter of engagement for the TOM proposal, previously informed Mr HT that the firm did not provide tax advice, that Mr HT's request would have been intended for DOT's accountant.

[173] The following Sunday, 12 June, as I have noted, Mr HT told Mr MK that the SIN proposal had been "confirmed" that morning, and asked Mr MK to "prepare a final" agreement "ASAP". Mr MK responded that day "will do", adding that the firm "still require[d] the security" for DOT's outstanding fees. He reminded Mr HT he would be "out of the office from Wednesday afternoon", and would "speak" with Mr HT the following day.

[174] Having received Mr HT's detailed instructions on Monday, 13 June, Mr MK sent his first version of the share sale agreement to Mr HT later that day. He raised issues about the payment of the purchase price, and DOT's creditors.

[175] The next day, 14 June, Mr HT asked Mr MK, amongst other things, whether particular matters should be included in the agreement. He said Mr KM, GM at DOT,

would supply the list of creditors. He said he would attend to the firm's request for payment of outstanding fees.

[176] When providing (by email) his second draft of the share sale agreement to Mr HT on 15 June for "review", Mr MK "offer[ed] to meet" with Mr HT when back from holiday on 23 June "to address an[y] residual matter" in the agreement.[56]

Consideration

[177] I accept it is open to argument that having received SIN's "indicative offer" from Mr HT late afternoon on 2 June, Mr MK could have been expected to respond to Mr HT earlier than he did five days later on 7 June.

[178] However, apart from telling Mr MK on Wednesday, 1 June, there were two possible, albeit different, transactions, Mr HT did not at that stage request Mr MK's urgent attention.

[179] Having received Mr HT's initial instructions on Wednesday, 8 June, followed by his request on Sunday, 12 June, to prepare the share sale agreement "ASAP", and his further detailed instructions on Monday 13 June, Mr MK provided his first draft of the share sale agreement later that day.

[180] Mr HT provided feedback, and further instructions to Mr MK on 14 June, and 15 June. Mr MK obtained Mr XY's confirmation that [Mr XY] would provide a guarantee of SIN's loan obligations that day.

[181] Whilst inconvenient for Mr HT to have Mr MK absent for a week at what Mr HT says was a crucial time in negotiating the terms of the share sale agreement, Mr MK had given advance notice of his holiday to Mr HT.

[182] As I have already observed, it was open to Mr HT to telephone the firm and ask to be referred to another lawyer to advance the matter, as Mr HT required. Mr MK says whilst away on holiday, Mr HT did not send him an email, or telephone him.

[183] Looking objectively, as I am required to do, at the time it took Mr MK to provide Mr HT with the two drafts of the share sale agreement, in the context of Mr MK's instructions I do not consider, as Mr HT contends, that Mr MK was untimely, or delayed complying with Mr HT's instructions.

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[56] Also provided to SIN's contact, Mr XY.

(4) Conditions (documents); settlement, share transfer – issues (d), (e), and (f)

(a) Parties positions

[184] Mr HT claims Mr MK did not prepare the documents "required" by clause 3.1 (conditions) of the share sale agreement. He also claims Mr MK did not disclose to him the transfer of shares to SIN recorded in the Companies Office on 24 July 2016.

[185] Mr MK says Mr HT did not require him to attend to "settlement, or the registration of the share transfer". He says he prepared the contract for services in favour of BEG, required by clause 3.1(d) of the share sale agreement, which he forwarded to Mr HT on 4 July, and again on 5 September.[57] He says he did not know about the change of ownership at the Companies Office until receipt from the Complaints Service of Mr HT's complaint.

(b) Discussion

(i) Mr HT's instructions

[186] This aspect of Mr HT's complaint concerns the period between Mr MK's return to the office from holiday on 24 June 2016, to 4 July 2016 when he sent his first invoice to Mr HT.

[187] On 24 June, to "prepare for settlement", Mr MK twice asked (by email) Mr HT for a copy of the share sale agreement, signed in his absence.

[188] Not having received a copy, on 27 June he asked Mr HT (a) for the "purchaser's solicitors' details" to "arrange settlement", and (b) whether "the conditions precedent to settlement [were] under control?"

[189] On 30 June, Mr MK told Mr HT, and DOT's accountant he would provide them with details of DOT's unpaid fees. He said he was "also working on [Mr HT's] consulting agreement and the other conditions to settlement". He said he would ask SIN's negotiator, Mr XY, that day for [Mr XY's] "lawyer's details for settlement". He asked when Mr HT was "expecting settlement to occur".

[190] In response that day Mr HT told Mr MK that the firm "will be paid". Mr MK, in turn, told Mr XY he was "preparing the documents" required by clause 3.1 including BEG's "consultancy agreement".

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[57] Mr MK added that the firm could not assist further in any event because DOT had not paid fees owed to the firm, and SIN did not make any payment to the firm as required by the shareholders loan provided for in the share sale agreement.

[191] Also that day, Mr MK provided Mr HT with details of DOT's unpaid legal fees, and the firm's work in progress for both the TOM and SIN transactions.[58] He asked Mr HT to respond to his earlier email that day so he could "progress to settlement".

[192] On 1 July, Mr HT told Mr MK [Mr MK] would not be required to settle the sale. He said he was "working to the terms" of the share sale agreement, and would provide a copy of the share sale agreement to Mr MK that morning. He acknowledged Mr MK had prepared BEG's contract for services. He said he had not yet given a share transfer to SIN.

[193] Mr MK provided Mr HT with the firm's invoice for fees concerning the TOM proposal, and the SIN transaction on 4 July. In a separate email that day he sent Mr HT "a basic contractors agreement" in respect of BEG's contract for services. He recommended that Mr HT "obtain tax and GST advice", which he said the firm did not provide, from DOT's accountants.

(ii) Consideration

Settlement

[194] Mr MK asked Mr HT on 24, 27 and 30 June for instructions (a) concerning settlement, and (b) the documents required by clause 3.1.

[195] However, on 1 July Mr HT told Mr MK that Mr MK would not be required to attend to settlement of the transaction. Mr HT said although his approach to settlement was "all irregular", he was satisfied with SIN as "a successful choice of partner".

[196] Mr MK repeats that having provided Mr HT with his second draft of the share sale agreement, Mr HT did not request further advice, and did not ask him to settle the transaction.

[197] The conclusion I have reached is that having informed Mr MK on 1 July that Mr MK's services would no longer be required on the transaction, it cannot therefore be open to Mr HT to later complain that Mr MK had not completed documents in respect of instructions either not provided, or withdrawn by Mr HT.

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[58] Outstanding invoices: (a) negotiations with two of DOT's managers, $13,156; claim against Mr JS, $26,382.74. See the firm's 27 June 2016 statements; work in progress, $15,360.

Share transfer

[198] Mr HT accepts Mr MK did not inform the Companies Office of the transfer of BEG's shares to SIN. However, he claims Mr MK should have told him as soon as [Mr MK] knew about the change of shareholding at the Companies Office.

[199] Mr MK says he did not know about the change of ownership until he received Mr HT's complaint to the Complaints Service. He asks whether Mr HT "permitted" the change to DOT's records because DOT holds its own share register.[59]

[200] Mr MK was told by Mr HT on 1 July he was not required to assist with settlement, and that BEG had not handed over a share transfer to SIN.

[201] In those circumstances it is difficult to see how Mr MK, when expressly told he would not be acting, and did not act on the settlement, can be held responsible for notification of a transfer of shares three and a half weeks later on 24 July. In my view no professional issues adverse to Mr MK arise from this aspect of Mr HT's complaint.

(5) Fees – issue (g)

(a) Parties' positions

[202] Mr HT claims the firm's fee of $21,500 plus GST in respect of the TOM, and SIN transactions was not fair and reasonable. He said he complained about the fee because Mr MK had not completed the required legal work. He said another firm of lawyers he consulted about the matter advised him the fee was "exorbitant".

[203] Mr MK says his legal work concerned (a) the proposed sale of DOT's remaining assets to TOM for which he had provided an estimate, and (b) the sale of BEG's shares in DOT to SIN.

[204] He says Mr HT's instructions were confined to drafting the share sale agreement, and BEG's consultancy agreement. He says Mr HT both "understood", and asked "questions" in response to his 13 June email to Mr HT that his fee estimate for the TOM transaction did not include the SIN transaction.

[59] Mr MK refers to ss 84(1), and 89(1) of the Companies Act 1993 concerning the requirement of company to keep a share register.

(b) Professional rules

[205] Lawyers are prohibited from charging a client a fee that is more than fair and reasonable. More particularly, r 9 provides:

> 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.

[206] 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 were included in a New Zealand Law Society publication referred to as New Zealand Law Society Property Transactions: Practice Guidelines 2003".[60]

[207] Considerations to be taken into account when determining whether a fee is fair and reasonable include:[61]

> (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.

[208] Because the process of determining a fair and reasonable fee is "an exercise in balanced judgment - not an arithmetical calculation",[62] one lawyer may reach a "different conclusion" from another lawyer "… as to what sum is fair and reasonable, although all should fall within a bracket which, in the vast majority of cases, will be narrow".[63]

[209] For that reason, there is a "proper reluctance to 'tinker' with bills by adjusting them by small amounts." It "is therefore appropriate for Standard's Committees not to be unduly timid when considering what a fair and reasonable fee is."[64] Where there is a fees complaint, "there is no presumption or onus either way as to whether the fee was fair and reasonable."[65]

[210] It is only when a fair and reasonable fee has been determined "… can it be assessed whether the fee charged is sufficiently close to that amount to properly remain

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[60] *AQ v ZI* LCRO 105/2010 (February 2011) at [75].
[61] *Hunstanton v Cambourne and Chester* LCRO 167/2009 (February 2010) at [22] referring to *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 at 441–442, and *Gallagher v Dobson* [1993] 3 NZLR 611 at 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 BK, BL and BM* LCRO 264/2012 (July 2013) at [57].
[62] *Property and Reversionary Investment Corporation Ltd*, above n 61 at 441–442.
[63] *Hunstanton*, above n 61 at [62].
[64] At [62].
[65] At [62].

unchanged".[66] A particular lawyer's approach to billing may not necessarily "… be a relevant consideration in determining whether a fee is fair and reasonable in all of the circumstances."[67]

(c) Discussion

[211] Mr MK issued two invoices to BEG/Mr HT concerning the sale of assets to TOM, and the sale of BEG's shares to SIN. First, his 30 June 2016 invoice comprised (a) fees of $15,360.00 plus GST representing the firms' recorded time on the file as at 23 June 2016; and (b) office expenses of $706.56 (including GST), totalling $18,370.56.[68]

[212] Secondly, his 31 August 2016 invoice for preparation of the BEG consultancy agreement comprised (a) fees of $2,250.00 plus GST; (b) office expenses of $103.50 (including GST); and (c) PPPSR registration plus agency fee ($20.00) of $40.00, totalling $2,731. Mr MK's recorded time as at 4 July 2016 was $1,250.00.

[213] Mr MK informed Mr HT on 13 June 2016 that work in progress on both the proposed sale of DOT's remaining assets to TOM, and the sale of shares to SIN amounted to $9,010 plus GST. He said his fee estimate in respect of the TOM transaction did not apply to the SIN transaction.[69]

[214] On 27 July, Mr HT told (by email) Mr MK he had "a problem" with Mr MK's 30 June 2016 invoice because some of the required work had not been done.

[215] In his response that day Mr MK stated (by email) that his work, which included both the TOM proposal, and the sale of shares to SIN, was done "in accordance with his estimates and [the firm's] terms of service". He asked Mr HT for instructions to prepare the documents required by clause 3.1 (conditions) for which there would be additional legal fees.[70]

[216] On 5 September, Mr MK sent a further invoice to Mr HT concerning the sale of shares to SIN. He reminded Mr HT that "the contractor's agreement" had been sent to [Mr HT] "on 4 July - see attached".[71]

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[66] At [11].
[67] *Hunstanton*, above n 61 at [15].
[68] The firm's "Matter Time Transactions" printout on 16 March 2017. The authors recorded time: Mr MK, $14,500.00 at $500 per hour; AMS, $520.00 at $400 per hour; CNB, $340.00 at $200 per hour.
[69] Apportioned as to the proposed sale to TOM, $6,500 plus GST; and to SIN, $2,510 plus GST.
[70] Mr MK had already completed the contract for services in favour of BEG.
[71] Invoice (31 August 2016) regarding the sale of shares to SIN for attendances to 31 August 2016. The 31 August 2016 invoice was attached.

[217] Mr MK says "[a]t no time" during communications with Mr HT about DOT's unpaid fees did Mr HT suggest that the firm's fees" previously invoiced were "unfair or unreasonable", or "raise a concern with the quantum of the fees".

[218] He says the total recorded time by the firm's lawyers was $16,610 – $6,500 for the TOM transaction, and $10,110 for the SIN transaction – which represented 33 hours work as at 23 June 2016.

[219] He explains that the firm's legal work for the proposed asset sale to TOM included reviewing a draft of the asset sale agreement (including employment aspects) prepared by TOM's lawyers, correspondence with TOM's lawyers, and attendances (meetings and telephone calls) on Mr HT.

[220] Concerning the SIN transaction, he says he reviewed SIN's draft agreement, prepared a new draft share sale agreement, and prepared BEG's contract for services, as well as attendances (meetings and telephone calls) on Mr HT.

[221] He considers his fees (a) were "in keeping" with the firm's fees for the previous work done for DOT, and (b) took into account "the complexity" of the transaction, the requirement for "timeliness", and the necessary "level of seniority" for the work.

[222] The Committee states that Mr MK's fee of $21,500 plus GST "appears at first to be at the high end of the scale" but "significant work" had been done which "justifie[d] the fee charged".

[223] However, no such approach or analysis as required by the rules referred to above appears in the Committee's decision. There is no reference to the Committee having sought the assistance of a cost assessor who would carry out an analysis of the bill of costs including the lawyer's file, and prepare a report for the Committee including an opinion of a fair and reasonable fee, or a range within which a fee would be considered fair and reasonable.

[224] Where a Standards Committee elects to carry out its own assessment of a lawyer's bill of costs, rather than delegate that task to a cost assessor, it is incumbent on the Committee to carry out an analysis in the same manner as would a costs assessor.

[225] It is not appropriate for a Review Officer, on review, to carry out what is in effect a first-instance assessment of the fairness and reasonableness of lawyer's fees not undertaken by a Standards Committee.

[226] For these reasons, it is appropriate that I refer this aspect of Mr HT's complaint back to the Committee for reconsideration.[72] In doing so, I draw the Committee's attention to the fact that the total fee component of Mr MK's two invoices is $17,610.00 plus GST, not $21,500 plus GST referred to by the Committee.[73]

Decision

[227] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Committee:

(a) Is confirmed as to the Committee's finding to take no further action concerning Mr HT's complaint, in particular, his allegations that Mr MK:

(i) failed to include in the share sale agreement, settlement provisions which required payment of the purchase price in exchange for the transfer of shares.

(ii) incorrectly described the numbers of sale shares, and options shares in the share sale agreement.

(iii) failed to prepare the documents required by clause 3.1 (conditions) of the share sale agreement.

(iv) failed to include in the share sale agreement other terms he was instructed to include.

(v) delayed in complying with Mr HT's instructions to draft the share sale agreement.

(vi) failed to settle the sale of shares to SIN.

(vii) failed to disclose to Mr HT that BEG's shares had been transferred to SIN.

(b) Is reversed as to the Committee's finding to take no further action concerning Mr HT's complaint that Mr MK's fees were not fair and reasonable.

[72] Section 209(1)(a) of the Act.
[73] The total of both invoices is $21,101.56.

[228] Pursuant to s 209(1)(a) of the Act, the Committee is directed to reconsider and determine Mr HT's complaint that Mr MK's 30 June 2016, and 31 August 2016 invoices were not fair and reasonable. In doing so, the Committee is directed to include as part of its investigation the inclusion of "Office Expenses" in each of Mr MK's invoices.

Anonymised publication

[229] 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 bereft of anything as might lead to their identification.

DATED this 29TH day of May 2020

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B A Galloway
Legal Complaints Review Officer

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

Mr HT, as the Applicant
Mr MK as the Respondent
Mr CB as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society