

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of the Standards Committee

**BETWEEN**

**IK**  
Applicant

**AND**

**VR**  
Respondent

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

**DECISION**

**Introduction**

[1] VR complained to the Lawyers Complaints Service about aspects of IK's representation of her. The complaint alleged:

- A failure by Mr IK to hold fees she had paid in advance, in a trust account (the trust account complaint).
- A failure by Mr IK to provide engagement and client care information (the terms of engagement complaint).
- A failure by Mr IK promptly to invoice Ms VR (the invoice complaint).
- A failure by Mr IK to return documents to Ms VR following termination of the retainer (the documents complaint).

[2] The Standards Committee considered the complaints and on 11 September 2014 made the following determination:

- A decision to prosecute Mr IK before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal in relation to the trust account complaint and the documents complaint (the prosecution decision).
- A finding of unsatisfactory conduct against Mr IK in relation to the terms of engagement complaint.
- A decision to take no further action in relation to the invoice complaint.

[3] Mr IK applies for review of that determination.<sup>1</sup> He is represented by counsel, Mr AW.

[4] The complaint that is the subject of this review spawned two others: a further complaint by Ms VR against Mr IK alleging overcharging by him (the fees complaint), and a complaint by Mr IK against Ms VR's lawyers in connection with comments made by a member of the firm in the context of one of Ms VR's complaints (the IK complaint).

[5] Both the fees complaint and the IK complaint arise out of exactly the same facts as the complaints referred to in paragraph [1] above. Separate Standards Committee decisions followed the fees complaint and the IK complaint; those decisions are the subject of separate applications for review and Mr AW is acting in those matters also.

[6] This review is confined to the Standards Committee decision with the identifying number 7854; that is to say the prosecution decision and the unsatisfactory conduct finding in relation to the terms of engagement complaint.

## **Background**

[7] In or about March or early April 2013 Ms VR asked Mr IK to act for her in relation to immigration issues. At the relevant time she was not living in New Zealand. Mr IK asked her to pay an initial retainer of \$50,000, and he also asked her to provide relevant information and some original documents, including her two children's [Country Z] passports.

[8] In early April 2013 Ms VR signed an authority to act authorising Mr AW or others from [Law Firm A] to act for her, as well as a contract with [X] Immigration Services (XIS). XIS appears to have been a company operated by Mr IK and/or his wife. At the time, Mr IK practised law under the name [Law Firm X].

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<sup>1</sup>Mr IK does not challenge the Standards Committee's decision to take no further action in relation to the invoice complaint.

[9] Ms VR does not appear to have signed any letter of engagement with [Law Firm X] although Mr IK claims to have given her a copy of his standard terms of engagement and appendix when they initially met in [Country Z]. This claim appears at odds with comments made by Mr AW in correspondence with Ms VR's counsel in which Mr AW appeared to acknowledge on behalf of Mr IK, that Ms VR had not in fact signed a contract with [Law Firm X].<sup>2</sup>

[10] On 23 May 2013 Ms VR, who was by then living in [NZ City B], wrote to Mr IK and Mr AW and terminated her retainer with them. She asked for the immediate return of documents she had given them, together with her file. She revoked the authority to act signed in favour of Mr AW/[Law Firm A] and asked for the return of her deposit less reasonable fees, and a detailed settlement statement.

[11] This triggered a response from Mr IK dated 27 May in which he indicated that he felt unable to return her documents as he considered that they may involve evidence of "criminal and/or immigration fraud", and he needed time to reflect on the ethical conundrum in which he found himself. He urged Ms VR to take independent legal advice, and said that he was contemplating reporting Ms VR "to the authorities". Mr IK's letter to Ms VR did not mention the funds that she had paid.

[12] On 30 May Ms VR's solicitor, Mr SG from the law firm [Law Firm B], wrote to Mr IK. The letter attached an authority signed by Ms VR and sought the return of her original documents (including her children's passports), together with a statement showing how funds had been allocated and requesting returning of balance of the funds. Mr SG copied Mr AW into that correspondence.

[13] At the time he sent his 30 May letter, neither Mr SG nor Ms VR had received Mr IK's 27 May letter to Ms VR. That correspondence arrived shortly after Mr SG had sent his letter; Mr SG reviewed Mr IK's letter and considered that it did not affect his request for the handover of Ms VR's file, and sent Mr IK a short email to that effect.

[14] Mr SG followed this up the next day with a reminder email to Mr IK.

[15] On 1 June, Mr IK replied by email to Mr SG's 30 May letter and email. Essentially he repeated his position that he did not believe he could release documents that may contain evidence of criminal wrongdoing by Ms VR but would reflect upon that; and that he would invoice Ms VR once the "barristers briefed" (presumably Mr AW/[Law Firm A]) had provided their invoices for work done. Mr IK indicated that the balance of

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<sup>2</sup> Email AW to SG (5 July 2013).

any funds that might be owing to Ms VR would be transferred to her “the week following next”.

[16] Mr SG’s response to this on 4 June was to draw Mr IK’s attention to rule 4.4.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, which obliges a former lawyer, when requested by a former client to release documents, records, funds or other property to do so “without undue delay” (subject to any lien). Mr SG’s point was that Mr IK could retain copies of any suspect documents. Mr SG also sought the immediate provision of invoices for approval and the release of funds by the end of that week. Finally, Mr SG informed Mr IK that his failure to comply with the requests by the end of that week would see a complaint made by Ms VR to the New Zealand Law Society (NZLS).

[17] Mr AW then responded on Mr IK’s behalf on 6 June. Mr AW rejected Mr SG’s threat to make a complaint, which he described as a “possibly unethical threat”. He indicated that Mr IK was still considering the ethical position in which he found himself in relation to documents that might have revealed evidence of fraud, and suggested that certified copies of those might be provided to Ms VR. Mr AW also indicated that an invoice would be provided by Mr IK and any funds remaining would be returned to her.

[18] Mr SG replied to Mr AW on the following day, disagreeing almost entirely with what Mr AW had written and once again requiring the immediate release of Ms VR’s file, an accounting of the funds paid and the return of any balance.

[19] Further email exchanges took place between the two lawyers, including an email from Mr AW to Mr SG’s supervising partner, in which he said:

I write in my personal capacity as a fellow practitioner who has been disrespected by your junior. Mr SG first threatened my solicitor Mr IK and has now made a new threat not only against him but me. Can you put this little puppy on a leash because if he makes one more threat to me I am going to show him a real lawyer’s bite and I assure you he will not like it? (*sic*).

[20] On 10 June Mr SG made a further request of Mr AW for information as to when the file and accounting information would be released.

## **Complaint**

[21] Against this background on 11 June 2013 Ms VR, through Mr SG, lodged a complaint with the Lawyers Complaints Service against Mr IK. The complaint referred to the following matters:

- Rule 4.4.1 of the rules (failing to release file and funds).

- Failing to pay the \$50,000 into a trust account.<sup>3</sup>
- Failing to provide a statement in relation to the funds after Ms VR terminated her retainer.<sup>4</sup>
- Failing to return Ms VR's funds as requested.<sup>5</sup>
- Failing to provide a letter of engagement.<sup>6</sup>
- Deducting fees without a corresponding invoice.<sup>7</sup>

[22] Mr SG foreshadowed a fees complaint, depending upon the quantum of any invoices received from Mr IK.

### **Mr IK's response and Mr SG's comments**

[23] Mr AW provided a detailed response to the complaint on 16 August 2013. Essentially Mr AW submitted that as Mr SG, and not Ms VR, had made the complaint against Mr IK, he was constrained by reasons of legal professional privilege from responding to the substance of the complaint. He thus sought a waiver from Ms VR.

[24] Mr AW did however submit that Mr IK denied any unsatisfactory conduct.

[25] Mr SG was asked by the Complaints Service for comment on Mr IK's 16 August response, in particular the request that Ms VR provide a waiver of privilege so that Mr IK could comprehensively respond to the complaint. In his letter to the Complaints Service Mr SG makes the point that he acts for Ms VR and that this ought to provide sufficient evidence of his authority to prepare and lodge her complaint on her behalf. Mr SG confirmed however that the complaint was Ms VR's; she understood the nature and content of it and signed it accordingly.

[26] This position was confirmed by the Standards Committee at a meeting on 26 August and Mr IK was invited to make a substantive response to Ms VR's complaint.

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<sup>3</sup> Lawyers and Conveyancers Act 2006, s 110(1)(a) and Lawyers and Conveyancers Act (Trust Account) Regulations 2008, reg 5.

<sup>4</sup> Regulation 12(7)(c).

<sup>5</sup> Section 110(1)(b).

<sup>6</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 3.4–3.5.

<sup>7</sup> Regulation 9.

### **Appointment of investigator**

[27] The Standards Committee appointed an investigator to provide it with a report in connection with Ms VR's complaint. The instrument of appointment identified the following areas:

- Tracing the \$50,000 retainer paid by Ms VR.
- Provision of client care information.
- Work undertaken on Ms VR's behalf.
- Fees rendered.
- Factors taken into account when rendering fees.
- Documents provided by Ms VR to Mr IK and his basis for retaining them, and what happened to the documents.

[28] The investigator met with both Mr AW and Mr IK, and provided the Standards Committee with a report covering the above matters, on 29 November 2013.

[29] A summary of the investigator's findings, relevant to this complaint, is:

#### *Retainer*

- The requested retainer was \$50,000; deduction of a bank fee of \$25 meant that the amount deposited into Mr IK's account was \$49,975.00. This occurred on 11 April 2013. The funds were not deposited into a trust account; they went into a personal account in Mr IK's name.
- The funds (or the greatest proportion of them) went from that account into a joint account of Mr and Mrs IK; about three weeks later they were transferred to another of Mr and Mrs IK's accounts.
- Thereafter smaller portions of the retainer were transferred into accounts operated by either or both Mr and Mrs IK.
- On or about 27 May 2013, the disparate retainer funds totalling \$49,975.00 were transferred into Mr IK's trust account.
- On 27 June the funds were transferred into Mr IK's business cheque account; from there to a personal account in Mrs IK's name.

- Mr IK's explanation for these movements was that when he met Ms VR in [Country Z] he did not have his trust account details and so she was given his personal bank account details. He did not expect so prompt a payment of the retainer, and overlooked making a transfer into his trust account as he was busy. Once the retainer was terminated by Ms VR on or about 24 May 2013, Mr IK appreciated that he needed to regularise the position and so transferred the retainer into his trust account. He then generated an invoice which enabled him to transfer the funds out of his trust account and into his business cheque account.

*Proper trust accounting procedures*

- Failure to pay the funds into a trust account
- Failure to record their receipt and maintain proper records of the funds.

*Client care information*

- Information apparently given to Ms VR on 28 March 2013 appeared compliant, although work on her behalf had been commenced some three to four weeks earlier.

*Documents received and retained*

- Most documents were released to Ms VR (through Mr SG) on 17 June 2013. Retained documents included a number of [Country Z] passports and [Country Z] household registers, [Country Z] will/trust documents and certified copies of some of those documents.
- Mr IK declined to release the retained documents as he considered that Ms VR may use them for a fraudulent purpose.

[30] The investigator's report was provided to Ms VR (through Mr SG), and Messrs IK and AW.

[31] Relevant to the procedural matrix is an application for review to this Office filed by Mr IK, in connection with a requirement by the Standards Committee that he produce his file as part of the complaint hearing process. Mr IK declined to do so, and applied to this Office to review that requirement. Ultimately the Standards Committee elected to deal with the complaint without Mr IK's file, at which point Mr AW on behalf of Mr IK withdrew the review application and applied for costs against the Standards Committee. In a

decision dated 6 August 2014, this Office declined to award costs against the Standards Committee. The decision also considered whether costs ought to be awarded against Mr IK on the basis of his withdrawn application. However, no order was made against him.

### **Notice of Hearing**

[32] The Standards Committee issued a notice of hearing on 12 March 2014, identifying a number of issues, with particular focus on issues arising from Mr IK's failure to deposit funds received to his trust account, and matters arising from Mr IK's alleged failure to provide a letter of engagement, and return files to Ms VR.

[33] Mr SG provided detailed submissions for the Standards Committee on behalf of Ms VR, as did Mr AW on behalf of Mr IK.

[34] Of significance, Mr AW submitted the following on behalf of Mr IK:

- That Mr IK had breached s 110(1)(a) of the Lawyers and Conveyancers Act 2006 (the Act) by not promptly paying the retainer into his trust account. This was described by Mr AW as "one-off" and deeply regretted by Mr IK, but not otherwise deserving of sanction.
- That he was in "technical breach" of the requirement to promptly provide client care information but no prejudice was suffered.
- A concession that it was open to the Standards Committee to make a finding of unsatisfactory conduct in relation to the trust account issue.

[35] As part of Mr IK's submissions, a statutory declaration was provided by his wife. This provided some background to and explanation of the retainer being deposited in one of Mr IK's personal bank accounts. Mrs IK acknowledged that there were delays on both her and Mr IK's parts in relation to the retainer ultimately being transferred to his trust account.

### **The Standards Committee's decision**

[36] The Standards Committee considered the complaint and delivered its decision on 11 September 2014. A summary of the decision is set out at [2] above.



## Review

[37] Mr AW filed the review on behalf of Mr IK, under cover of letter dated 29 October 2014. That letter also contained Mr IK's review of the fees complaint. Some of the matters raised by Mr AW cover both reviews. However for the purposes of this review, points made by him in relation only to the fees complaint will be put to one side and considered in a separate decision.

[38] The review raises the following points:

- The Standards Committee failed to take into account Mr IK's submissions and/or evidence.
- The Standards Committee wrongly preferred and adopted Ms VR's version of events without providing reasons for doing so.
- The notice of hearing lacked particulars.
- Ms VR's original complaint and subsequent submissions and evidence, varied and Mr IK was not given an opportunity to respond.
- The Standards Committee made one or more errors of fact or law.
- The decision was arbitrary and capricious.
- It was disproportionate to prosecute Mr IK for failing to hold client funds on trust and/or return documents.
- The Standards Committee did not make a decision to inquire into the complaint; it did not conduct an inquiry and so the ultimate determination was void ab initio.
- The Legal Standards Officer managing the complaint also took part in the Standards Committee's decision-making, when she was not an appointed member of that Committee.
- Ms VR's counsel should be debarred from representing her.
- The Standards Committee was wrong to refer some matters of complaint to the Tribunal, and make determinations on other matters of complaint.

[39] By way of remedy, Mr AW seeks the following on behalf of Mr IK:

- That the prosecution decision is quashed.
- That a fresh Standards Committee considers the trust account complaint.
- That the documents complaint is “permanently quashed”.
- That the finding of unsatisfactory conduct in relation to the terms of engagement complaint be reversed and “permanently quashed”.
- As an alternative, Mr AW asks that the finding of unsatisfactory conduct is reversed, and that “the Tribunal (considers) the entirety of matters afresh and entirely for itself”.
- Finally, and quite obviously, Mr IK takes no issue with the Standards Committee decision to take no further action on the invoice complaint.

[40] I am therefore being asked to:

- quash the prosecution decision and the finding of unsatisfactory conduct, or
- uphold the prosecution decision and quash the finding of unsatisfactory conduct and then refer that complaint to the Tribunal to be considered together with the two complaints referred there.

[41] Mr AW submits that this latter course would be consistent with the Court of Appeal’s approach in *Orlov v New Zealand Law Society*,<sup>8</sup> in which (according to Mr AW) the Court indicated a view<sup>9</sup> that cases involving multiple complaints of varying degrees of seriousness against the same practitioner, ought not to be fragmented and if there is to be a referral to the Tribunal then all matters should be so referred, so that the Tribunal gets the big picture.

### **Role of the LCRO on review**

[42] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgment for that of the Standards Committee, without good reason.

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<sup>8</sup> *Orlov v New Zealand Law Society* [2013] NZCA 230, [2013] 3 NZLR 562.

<sup>9</sup> At [54].

[43] In *Deliu v Hong*<sup>10</sup> Winkelmann J provided helpful guidance on the nature and scope of a review. She described the review framework in the Act as creating “a very particular statutory process”.<sup>11</sup>

[44] Her Honour noted that:<sup>12</sup>

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 .... Nevertheless .... 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.

### **The Hearing**

A hearing proceeded on 12 November 2015. That hearing traversed the three interlocking reviews, and covered a full day. A significant part of the hearing time was devoted to Mr AW’s extensive submissions advanced on behalf of Mr IK.

### **Discussion**

[45] Issues to be addressed are:

- (a) The scope of the LCRO’s power to review a Committee’s decision to prosecute a lawyer before the Disciplinary Tribunal.
- (b) Did the Committee err in referring some matters to the Tribunal, whilst electing to deal with others?
- (c) Was the Committee’s decision to refer two matters to the Tribunal a disproportionate response?
- (d) Should the Committee’s finding of unsatisfactory conduct in respect to the letter of engagement finding be quashed?
- (e) Were there procedural irregularities in the way in which the complaints were managed, of such significance as to merit quashing the decision in its entirety, and returning the complaints to another Committee for consideration?

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<sup>10</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209.

<sup>11</sup> At [39].

<sup>12</sup> At [41].

*The scope of the LCRO's power to review a Committee's decision to prosecute a lawyer before the disciplinary Tribunal.*

[46] The Act provides for two categories of errant behaviour by a lawyer: misconduct and unsatisfactory conduct.<sup>13</sup> The former is the more serious and can lead ultimately to a practitioner being struck off by the Tribunal.<sup>14</sup>

[47] Standards Committees may only make findings about the lesser category of errant behaviour, unsatisfactory conduct.<sup>15</sup> When confronted with a complaint<sup>16</sup> in which the spectre of misconduct is present a Standards Committee may direct it to be considered by the Tribunal,<sup>17</sup> and thereafter the Committee must frame and lay any appropriate charges with the Tribunal<sup>18</sup> and serve them on the practitioner (and any complainant).

[48] There is no time limit prescribed within which charges must be framed, laid and served, but s 154 appears to contemplate – without expressly saying so – both the decision to prosecute and the charges being framed more or less simultaneously. There is a right to review a decision to prosecute,<sup>19</sup> which must be exercised within 30 working days after the decision,<sup>20</sup> and as this Office observed in AE,<sup>21</sup> best practice would suggest that charges ought to be at least framed, laid and served within the 30-day review period.<sup>22</sup>

[49] Significantly, when directing a complaint to be considered by the Tribunal, a Standards Committee is not obliged to provide reasons. This is evident from the language of s 158 of the Act, which requires reasons to be given only when a Standards Committee makes a finding of unsatisfactory conduct or determines to take no further action.

[50] In *Orlov v New Zealand Law Society* the Court of Appeal commented, “there is now oversight of the referral decision by the independent LCRO”.<sup>23</sup> In addition, several decisions of this Office provided helpful guidance as to how that “oversight” ought to be exercised.<sup>24</sup>

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<sup>13</sup> Defined in s 7 and 12 respectively of the Lawyers and Conveyancers Act 2006.

<sup>14</sup> Section 244.

<sup>15</sup> Section 152(2)(b).

<sup>16</sup> Including an own-motion investigation under s 130(c).

<sup>17</sup> Section 152(2)(a).

<sup>18</sup> Section 154.

<sup>19</sup> Section 193.

<sup>20</sup> Section 198(b).

<sup>21</sup> AE - A decision to prosecute LCRO 93 & 338/2013.

<sup>22</sup> At [7].

<sup>23</sup> Above n 8, at [54](d).

<sup>24</sup> For a review of these decisions see *PA v Standards Committee* LCRO 267/2014.

[51] The starting point is that it will only be in exceptional cases that a decision to prosecute will be reversed on review.<sup>25</sup> In *FF v Wellington Standards Committee 2* this Office summarised the principles to be applied when reviewing a decision to prosecute as follows:<sup>26</sup>

[49] [Previous LCRO [Legal Complaints Review Officer] cases] have identified the principles set forth in the various Court decisions where a decision to prosecute might be revisited. These include situations in which the decision to prosecute was:

- (a) significantly influenced by irrelevant considerations.
- (b) exercised for collateral purposes unrelated to the objectives of the statute in question (and therefore an abuse of process).
- (c) exercised in a discriminatory manner.
- (d) exercised capriciously, in bad faith, or with malice.

[50] In addition, it was noted in the *Rugby* decision that “if the conduct was manifestly acceptable then this might be evidence of some improper motivation in the bringing of the prosecution”.

[51] While I do not necessarily agree that this might constitute evidence of some improper motivation in the bringing of the prosecution, I do agree that the decision to prosecute should be set aside if the conduct was manifestly acceptable.

[52] In *OJ v PT*<sup>27</sup> this Office held that the review of a decision to prosecute does not include a review of the evidence that was before the Standards Committee.

[53] Finally, in *PA v Standards Committee* this Office said:<sup>28</sup>

... where a decision includes a major error, where there is a manifest flaw in the Committee’s reasoning, where there has been a significant omission or a failure to comply with natural justice principles, a question necessarily arises as to whether the resulting decision can stand.

*Did the Committee err in referring some matters to the Tribunal, whilst electing to deal with others?*

[54] As noted in *Orlov*<sup>29</sup> the Court of Appeal considered the question as to whether a threshold test must be met (degree of gravity) before a Committee could exercise its power to refer a matter to the Tribunal.

[55] In considering that issue, the Court of Appeal affirmed that there was no threshold test, and expressed the view that in some circumstances, rather than have the

<sup>25</sup> See for example *Poole v Yorkshire* LCRO 133/2009.

<sup>26</sup> *FF v Wellington Standards Committee 2* LCRO 23/2011.

<sup>27</sup> *OJ v PT* LCRO 168/2011.

<sup>28</sup> *PA v Standards Committee* LCRO 267/2014 at [47].

<sup>29</sup> Above n 8.

inquiry process fragmented by some matters being considered by the Committee and others by the Tribunal, that it may be useful for all issues under consideration to be sent to the Tribunal, so that the Tribunal was able to get the “big picture”.

[56] But it is not the case that a Committee must, if it decides to refer some aspects of the complaint to the Tribunal, refer all matters to the Tribunal, and Mr AW helpfully acknowledged that to be the case.

[57] In the present instance, I can see no compelling arguments to support conclusion that the Committee should have referred all matters to the Tribunal. Mr AW understandably takes no issue with the Committee’s decision to take no further action on the invoice complaint. He sees no impediment to the Committee dealing with that matter on a discrete basis. Nor can reasonable objection be raised to the Committee separately considering the engagement letter complaint. That complaint presents as having no particular nexus or connection to the trust account and return of files matters, and I do not consider it likely that the Tribunal’s investigation of those two issues would be materially influenced by the Committee’s decision to deal with two relatively straightforward conduct issues being issues which would commonly be the subject of a Committee inquiry, rather than an inquiry by the Disciplinary Tribunal.

*Was the Committee’s decision to refer two matters to the Tribunal a disproportionate response?*

[58] Mr AW submits that the Committee’s decision to send two matters to the Tribunal presents as a disproportionate response. In support of that proposition, he provides a number of Standards Committee decisions which support he says, argument that Standards Committees have commonly dealt with matters similar to those engaged in this case, by reaching findings of unsatisfactory conduct rather than referral to the Tribunal.

[59] I have considered the decisions carefully and they do not, in my view, provide assistance. What those decisions do illustrate, is that inquiries into disciplinary complaints must proceed from a careful examination of the facts of each particular case.

[60] Mr AW characterises Mr IK’s failure to deposit funds received to his trust account as an unfortunate error, an oversight, a mistake, but one made without any suggestion of intention to not comply with applicable rules and regulations. Responsibility for the transferring of the funds through several personal accounts is sheeted home to Mr IK’s wife. She, it is argued, moved the funds around without Mr IK’s knowledge.

[61] I disagree with Mr AW's characterisation of the conduct as being conduct which is mitigated by argument of honest mistake and therefore conduct which should properly, if it must attract a disciplinary sanction, be at the level of an unsatisfactory conduct finding, and not at a level of seriousness which should engage the attention of the Disciplinary Tribunal.

[62] In my view, there is nothing remarkable in the Committee's decision to refer the trust account breaches to the Tribunal, and its decision to do so cannot reasonably be seen to reflect a disproportionate response from the Committee. The Act and Rules which govern the management of client funds have been said to be at the very heart of professional practice because the public are entitled to confidence that a professional adviser will treat their affairs and their property with the utmost care and good faith.<sup>30</sup> It is important to note that the conduct complained of does not simply engage allegation that Mr IK failed to lodge funds to his trust account, but the subsequent transferring of those funds through several accounts under the control of Mr IK and his wife.

[63] Nor does the decision to refer the failure to provide files complaint present as a disproportionate response. Significant to this issue is the time delay in obtaining part of the files and documents requested, the nature of some of the documentation retained, the options available to Mr IK, and importantly the opportunity accorded by referral to the Tribunal for allegation that Mr IK improperly endeavoured to use the retention of client documents to assert leverage in respect to the funds he was holding to be tested. I do not propose to interfere with the Committee's decision to refer two matters to the Disciplinary Tribunal. It was a decision supported by the facts and consistent with the principles of consumer protection which underpin the Act.

*Should the Committee's finding of unsatisfactory conduct in respect to the letter of engagement finding be quashed?*

[64] A significant feature of the disciplinary regime introduced under the Act, and the Lawyers Conduct and Client Care Rules, is the focus placed on the obligation for lawyers to ensure that their clients are kept fully informed. This obligation commences at the outset of the retainer, with the requirement for lawyers to provide their clients with information in writing on the principal aspects of client service, including the basis on which fees are to be charged, and a copy of the client care and information set out in the

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<sup>30</sup> *Auckland Standards Committee v Chen* [2015] NZLCDT 2 at [12].

preface to the Rules. The requirement to keep clients informed is reinforced in a number of the conduct Rules.<sup>31</sup>

[65] Mr IK submits that the failure to provide a letter of engagement early in the retainer was attributable in part to the fact that he was initially introduced to Ms VR through a family friend, and he unwisely placed too much reliance on the representations that arose out of the personal relationship, rather than putting the arrangements on a more professional basis at first step.

[66] Mr IK submits that he provided Ms VR with a letter of engagement some weeks after he commenced work. That is disputed by Ms VR. In any event, as the Committee notes, by the time Mr IK got round to formalising a letter of engagement, fees of almost \$10,000 had accrued.

[67] This could not be described as a conventional retainer. Mr IK says that he was instructed to travel to [Country Z] to meet with Ms VR, and was instructed by her in regard to a number of matters. He contends that prior to travelling to [Country Z] he discussed arrangements with Ms VR in a number of phone calls. His account records that he charged Ms VR for the air tickets, and for his travelling time. Mr IK emphasised at hearing that he was running a very busy practice, indeed that argument was advanced on occasions as explanation for his failure to be more attentive to some administrative matters, but it does present as surprising that a practitioner would commence work in circumstances so unusual as these, without taking care to ensure that his client fully understood the basis on which he was prepared to do the work.

[68] The problems arising from the failure to clarify instructions at commencement are well illustrated by the explanations Mr IK offers in respect to his management of the fees paid in advance by Ms VR. Mr IK says that Ms VR wanted to pay her fees in cash, but he refused to accept cash, mindful of the difficulties that could result. He says that he did not have his trust account details at hand when he was in [Country Z].

[69] Mr IK was required to provide Ms VR with a letter of engagement. His failure to do so, particularly when considered in the context of the particular nature of this retainer, his incurring of both substantial fees and disbursement costs prior to providing a letter of engagement, is a clear breach of Rule 3.4, and does constitute unsatisfactory conduct.

*Were there procedural irregularities in the way in which the complaints were managed of such significance as to merit quashing the decision in its entirety, and returning the complaints to another Committee for consideration?*

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<sup>31</sup> Above n 6, rr 3.2, 3.3, 3.5, 7, 7.1, 7.2 and 13.3.



[70] Mr AW raises a number of objections to the manner in which the Committee proceeded with its inquiry. He submits that there were procedural irregularities in the way in which the Committee conducted its inquiry of such significance, that Mr IK's opportunity for fair hearing was significantly compromised.

[71] The complaint was filed in June 2013. The Committee delivered its decision on the 11 September 2014. At first blush, a delay of some fifteen months presents as at odds with the objective of achieving expeditious resolution of complaints.

[72] I have carefully examined all of the exchanges between the Committee and Mr IK's representative from time of filing of complaint to date of delivery of decision.

[73] I do not propose to respond to each of the procedural issues raised by Mr AW, except to note that I have carefully considered all issues raised, and do not consider that the procedural issues raised in any sense, if accepted, compromised Mr IK's ability to put his position to the Committee, and to adequately respond to all issues. To the contrary, on traversing the winding road of exchanges between counsel and the Committee, my sense was that Mr IK's response to the complaint could have been promoted by advancement of a more direct route.

[74] For some three months the inquiry was diverted by argument that Mr IK was inhibited from responding to the complaint as it was contended that the complaint was being advanced by Mr SG. In correspondence to the Committee dated 22 July 2013, Mr AW submitted that it was "beyond cavil" that the complaint was Mr SG's. This despite the fact that the complaint, lodged in the appropriate form, clearly records Ms VR as the complainant, and Ms VR's authorising of Mr SG to act for her on the complaint.

[75] The Committee's request of Mr IK to provide his files was met with application to this Office to review the requirement to produce files, resulting ultimately in the Committee's decision not to seek the files, and the withdrawal of the application.

[76] Mr AW submits that the Committee failed to follow due process in that it failed to advise that it had completed inquiry into the complaint (s 137(a)) and then forwarded particulars of the complaint to Mr IK as required by s 141(a) of the Act. Complaint is also made that the notice of hearing issued was defective in that it failed to advise the date the Committee would convene the hearing. Underpinning these submissions, is argument that Mr IK was not sufficiently informed as to the nature of the complaints, and lacked opportunity to respond to them.

[77] On 1 July 2013, a copy of Ms VR's complaint was forwarded to Mr IK. The background to the complaints, and the particulars of each complaint, were detailed in a five page submission. Careful reading of that submission would lead to inescapable conclusion that it would present as incomprehensible that Mr IK would not have had a clear understanding at the outset as to the grounds of complaint.

[78] Mr AW submits that the Committee was required to both advise Mr IK of its intention to commence an inquiry, and to provide him with particulars of the complaint. He argues that the requirement to provide the practitioner with particulars cannot be achieved by the Committee simply providing a copy of the complaint.

[79] The Lawyers Complaints Service Procedures Manual, notes at [10.1], that if a Committee determines there is to be an inquiry into a complaint, the complaint should be further particularised "if required".

[80] On 19 September 2013, the Committee decided to appoint an investigator. Objections were taken, and there was some delay, but the investigator's report was made available to the Committee on the 5 December 2013. Importantly, Mr IK and his counsel had opportunity to meet with the investigator and provide input. The report can only be described as comprehensive. It addresses in significant detail matters relating to the most serious of the complaints (irregularities in management of client's funds) and addresses the nature of the work carried out, fee issues, retention of documents, letter of engagement, and concludes with identifying areas where the investigator considers there are reasonable grounds to suspect that breaches of the Act and the Rules have occurred.

[81] On the 31 January 2014, Mr AW makes complaint to the Committee that his client still does not understand the nature of the complaints he is facing.

[82] On the 14 March 2014, the Committee issues a notice of hearing. The notice is comprehensive and elaborates with succinctness and clarity the scope of the hearing. The parties are requested to provide submissions by the 14 April 2014.

[83] On the 14 April 2014, Mr SG provides comprehensive submissions. Mr AW is provided with a copy of those submissions.

[84] Mr AW, files submissions on the 17 April. Those submissions are also comprehensive and repeat allegation that his client is being denied fair process. That being said, Mr AW informs the Committee that he will make best attempt to provide response on behalf of his client. He provides expansive response to allegation that his client mismanaged funds, provides explanation for his client's failure to provide

documents, and makes detailed suggestions as to his view on appropriate process and penalty. In support, he provides extensive authority, a personal statement from Mr IK, and a declaration from Mr IK's wife.

[85] Mr AW raises concern that his submissions, filed out of time, were not considered by the Committee. I am unable to locate on the Standards Committee file any direct acknowledgement from the Committee that the submissions would be considered, but it is clear from the Committee's decision that the submissions were considered. The decision refers to specific matters addressed in Mr AW's submissions of 17 April.

[86] Complaint is raised that the Committee made request of the parties to file their submissions simultaneously, and thus Mr IK was deprived of opportunity to respond to Mr SG's submissions. The Committee process is inquisitorial as opposed to adversarial. There is no obligation on a Committee to engage the parties in a continuing exchange of responses, and it is clear that matters raised by Mr SG were comprehensively replied to.

[87] There are two issues which are pivotal to a complaint inquiry. A practitioner must be made fully aware of the nature of the complaint, and be given proper opportunity to respond to it. I see no procedural irregularities that could be said to have frustrated the achievement of those two objectives. The particulars of the complaints were clearly identified when the complaint was filed. The appointment of an investigator provided opportunity for the complaints to be further particularised, and for Mr IK to have further right of response. The notice of hearing identified the complaints with clarity. Mr IK was given opportunity to respond and did so.

[88] At the commencement of the Committee inquiry, Ms UQ, was a member of the Standards Committee charged with managing the IK complaints. Whilst I am uncertain as to exact date, she appears to have resigned from her position as a Committee member around mid March 2014. She then took up a position as legal standards officer, and in that role continued to have involvement with the Committee. The Committee's decision is signed by Ms UQ, for and on behalf of the Standards Committee. Mr AW submits that the process has been contaminated by Ms UQ's change of roles. Mr AW fairly says, that he is not arguing that Ms UQ has acted improperly, but perception is everything, and Ms UQ's shift in roles is a bad look.

[89] I am not persuaded that the matter is of such significance as to compromise the fairness of the process. There is no evidence adduced to support argument that Ms UQ's change of role affected the process. Her transition from Committee member to that of legal standards officer occurred around the time the Committee issued its notice of

hearing, and before the Committee had met to deliberate. The quorum of the Committee was maintained.

[90] Objection is taken to Ms UQ signing the decision. The requirement to provide written notice of a determination pursuant to s 152(2)(b) or (c) of the Act is contained within s 158. That section contains no direction as to the form of the notice, but does identify the information that it must contain.

[91] The decision clearly records, that Ms UQ has signed the determination “for and on behalf of” the Committee. It is reasonable to conclude, in the absence of evidence to the contrary, that Ms UQ was instructed by the Committee to sign the decision off. The manner in which the determination was signed, does not in my view compromise the integrity of the decision. In saying that however, I consider that as a matter of best practice it would be desirable that a Committee member, preferably the convener, sign off Committee decisions.

[92] Even if it was established that the Committee’s decision had been contaminated by unfair process, the procedural objections raised by Mr AW, if established, are all capable of cure by the process of review. It could not be advanced on review that Mr IK remained unaware as to the nature of the complaints. Nor could it be said that Mr IK had not had opportunity to respond. Mr AW, in the course of a lengthy hearing, conscientiously took every point available to Mr IK. In considering all matters afresh, as I am able to do, I see no basis to interfere with the Committee’s decision.

### **Costs**

[93] Where a finding of unsatisfactory conduct is made or 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.

[94] Taking into account the Costs Guidelines of this Office, Mr IK 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.

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

**Decision**

[96] Pursuant to s 211(1)(a) of the Lawyers And Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

Dated this 21<sup>st</sup> day of December 2015.

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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 IK as the Applicant  
Mr AW as the representative for the Applicant  
VR as the Respondent  
The Standards Committee  
The New Zealand Law Society