LCRO 234/2014

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	**TC** Applicant
AND	**MR & MRS SH** Respondent

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

DECISION

Introduction

[1] Mr TC has applied for a review of a decision of the [Area] Standards Committee X in which the Committee made findings of unsatisfactory conduct against Mr TC.

[2] There has been a regrettable delay in having this decision available to the parties. I apologise to them for that delay.

Background

[3] Mr and Mrs SH both had previous marriages and had, prior to entering into their marriage, established trusts to protect their individual assets with a view to ensuring that those assets would be protected for the children of those marriages.

[4] In Mr SH's case he had three children and had set up the Trust A. In the case of Mrs SH, she had two children and had set up the Trust B.

[5] During the course of their relationship, Mr and Mrs SH acquired further assets together. They instructed a solicitor, Mr G, to form a third trust with the intention that this trust would provide a vehicle for managing their jointly acquired assets (Trust C). On Trust C being wound-up it was anticipated that the couple's five children would share equally in its assets.

[6] For reasons uncertain, Mr and Mrs SH's instructions to establish Trust C were not carried out. When this oversight was drawn to their attention, Mr and Mrs SH met with Mr TC and discussed with him ways to resolve the problem arising from Mr G's failure to complete his instructions.

[7] There is dispute between Mr and Mrs SH and Mr TC, as to the scope of Mr TC's instructions. This has led to a consideration of whether Mr TC's fees were fair and reasonable.

[8] Mr TC met with Mr and Mrs SH on 28 June 2012. He then immediately commenced work.

Initial correspondence

[9] On 9 July 2012, Mr TC forwarded a substantial amount of documentation to Mr and Mrs SH. Mr TC had understood his instructions to be to complete an overhaul of the couple's financial arrangements with the view to transferring the assets of the Trust A and Trust B into a newly created trust (Trust D), which would be set up for Mr and Mrs SH, by Mr TC.

[10] Mr SH replied to Mr TC's letter, also on 9 July 2012, and provided details about the assets owned by the Trust A, Trust B and Trust C.

[11] This was followed by further correspondence to Mr TC from Mr SH on 13 July 2012, in which he provided additional information, including a draft deed in its very early stages that had been prepared by Mr G when he received instructions to set up Trust C.

[12] On 19 July 2012 Mr TC wrote to Mr and Mrs SH, enclosing statements setting out the financial positions of Mr and Mrs SH and the three trusts for Mr and Mrs SH to check. He also raised issues in relation to wills he had drafted, and made suggestions concerning an enduring power of attorney (EPOA) and living wills.

[13] On 9 August 2012 Mr TC wrote once again to Mr and Mrs SH, seeking clarification about aspects of Trust A and Trust B. Mr TC referred to the advice provided in his correspondence dated 19 July 2012 in relation to EPOAs and living wills.

Letter and terms of engagement

[14] Mr TC forwarded Mr and Mrs SH his terms of engagement in correspondence dated 13 August 2012. The correspondence included a document called "Information for Clients" and a separate document called "Standard Terms of Engagement.

[15] The Information for Clients included the following:

> 1. Fees
>
> The basis on which fees will be charged is set out in our letter of engagement. When payment of fees is to be made is set out in our Standard Terms of Engagement.
>
> ...

[16] The Standard Terms of Engagement included the following information about fees:

> 3. **Our fees**
>
> We believe that it is important that you understand the basis upon which our fees will be calculated, the times when fees and disbursements will be invoiced, and our expectations for payment.
>
> ...
>
> Where we agree that out legal fees are calculated on the basis of the time involved, the fee will reflect the hourly rates of the lawyers involved at the time the advice was provided.
>
> ...
>
> We can give estimates of the likely fees based on our experience with similar engagements. ... We can also inform you periodically of the level of fees incurred or inform you when fees reach a specified level.
>
> …
>
> 5 **Billing and accounts**

> We find that regular billing gives much better control for our clients and ourselves ... Accordingly invoices will be issued on a monthly basis ...

Further correspondence

[17] Mr TC wrote again to Mr and Mrs SH on 15 August 2012 enclosing documents for Mr and Mrs SH to complete as part of the work that he was doing.

[18] On 3 September 2012 Mr TC wrote further to Mr and Mrs SH. He asked that they confirm the accuracy of financial statements he had forwarded, and for instructions that would enable him to implement the proposals "discussed and as spelt out in our letter to you of 9 July 2012".

[19] On 9 October 2012 Mr TC advised his clients that he was anxious to complete the "restructuring of [their] affairs", and he made further request for return of documentation. He reminded Mr and Mrs SH about the wills he had drafted for them, as well as noting his earlier advice about EPOAs.

[20] Mr SH responded by email on 2 November 2012. In that correspondence he:

(a) Apologised for not responding to Mr TC's several communications.

(b) Indicated that resolution had been reached in respect to two pressing issues which had capacity to impact on the restructuring.

(c) Advised that his exposure to risk of a litigation claim had been resolved.

(d) Confirmed that potential problems that could have arisen as a consequence of his previous lawyer failing to complete Trust C had been significantly resolved by the sale of that trust's assets.

[21] In his email Mr SH raised no concerns about the work that had been done by Mr TC to date. He indicated that he and Mrs SH would discuss "living wills and other matters [which Mr TC had raised] [and would] respond ... on Monday 5th November".

[22] On 9 November Mr TC made further request for the return of documentation indicating that he was looking forward to "completing the restructuring".

[23] Having not heard from Mr and Mrs SH by 14 November, on that date in an email Mr TC "gently [reminded Mr and Mrs SH]" that he was waiting to receive "information and documents ... to complete [his] mandate".

[24] Mr SH replied advising that he was unable to locate the documents. Further copies were sent to him by Mr TC on 19 November.

[25] On 28 November 2012, Mr and Mrs SH wrote to Mr TC and advised that they had perused the documentation and were unhappy with the proposed arrangements. By then, the retainer had been on foot for some five months, since at least late June. This was Mr and Mrs SH's first challenge to the work that had been done by Mr TC.

[26] Particular concern was expressed by Mrs SH that the proposed resettlement did not accurately reflect their contributions. She indicated that the couple had formed the view that their financial positions could be properly protected by preservation of the existing trust structures, and the creation (as initially contemplated) of a viable third trust.

[27] Mr TC responded by letter dated 29 November and addressed the points that had been raised by Mrs SH. He sought clarification of instructions, and raised the issue of fees, saying:

> You should be aware that my recorded time in relation to this matter has been very considerable and that until 14 November 2012 I have spent some 30 hours in respect of this transaction and there will be further time involved in making the alterations referred to in this letter. You should appreciate that the charge-out rate has built into it secretarial time which in preparing these documents has been considerable. My normal fee to date for this work would be $15,000 plus GST which has been incurred because of the complexity of what was proposed.

[28] An invoice did not accompany that letter; in fact, none had been sent since the retainer began in June.

[29] Mr and Mrs SH replied to this letter on 15 December. They said that "payment of your reasonable fees has never been an issue for us. We have consulted you for high expertise ..."

[30] Mr and Mrs SH raised the unanticipated complexity of the work that had been done by Mr TC, and reiterated their requirements which was "normalising Trust C".

[31] As to legal fees, no issue was taken with Mr TC's comments recorded in [27] above, however Mr and Mrs SH did say "Please give us an indication of the costs of completing [work that had been outlined in Mr TC's 29 November letter]".

[32] Mr and Mrs SH repeated their view of how matters ought to be structured, which was that the existing family trusts each held for the benefit of their own children, should remain as they were, and that a third trust would deal with assets the couple had acquired since entering into a relationship.

[33] Mr TC replied to this letter on 18 December. In that letter he set out his advice that his proposals, which differed from the SH's proposed arrangements, afforded both greater flexibility and asset protection.

[34] Mr TC suggested that Mr and Mrs SH should carefully review the work he had done and the advice he had given, before proceeding with "the three existing Trusts". He noted that he did not consider "that [he had] been mistaken in what we have reported to you".

[35] Mr TC did not respond to the couple's request for an indication of costs to complete specified work.

[36] On 14 January and 6 March 2013 Mr TC pressed for instructions as to how Mr and Mrs SH wished to proceed. In his latter email Mr TC said that he was "under pressure to finalise [the matter], render an account and close [his] file".

[37] On 19 March 2013, Mr TC advised Mr and Mrs SH that his recommendation was to complete the restructuring in terms that he had initially proposed. He attached with that correspondence his account for services rendered, in the sum of $17,489.00 plus GST of $2,623.35 and a disbursement of $20. The total of the invoice was $20,132.35.

[38] This was the first (and indeed only) invoice that Mr TC rendered to Mr and Mrs SH.

[39] On receipt of that correspondence, on 22 March 2013 Mr and Mrs SH sought clarification from Mr TC as to the scope of what he understood his initial instructions to be, and requested a breakdown of his billing records.

[40] Mr TC's response was sent to Mr and Mrs SH on 25 March. He outlined his understanding of his instructions as being that Mr and Mrs SH had:[1]

> entered into second relationships [and wanted] to organise their joint affairs so that the children of both marriages effectively shared [the couple's] assets acquired after the date that the relationship began.

[41] Mr TC set out the advice he had given about that, and his reasons for giving that advice. He made the point that Trust C could not be used to achieve the couple's goals, and that what was required was the formal creation of a fourth trust (Trust D).

[1] Letter Mr TC to Mr and Mrs SH (25 March 2013) at [2].

[42] Mr TC set out the steps he had taken to set up Trust D, as well as the work he had undertaken to ensure that the SH's instructions – namely, to organise their joint affairs so that the children of both marriages effectively shared the couple's assets acquired after the date that the relationship began – were given formal and binding effect.[2]

[43] An issue about possible unfairness in the structures had earlier been raised by Mrs SH and in his letter Mr TC explained how he had also addressed that.

[44] Underlying Mr TC's explanation was that Trust C could not be used as a vehicle to accomplish Mr and Mrs SH's intentions.

Complaint directly to Mr TC

[45] On 17 April 2013 in a letter headed "Complaint" Mr and Mrs SH responded to Mr TC's letter to them dated 25 March, and set out their complaint about the legal services he had provided.

[46] The couple identified two areas of complaint:

(a) Fees "which [are] significantly in excess of our expectation".

(b) "We do not have anything that we instructed, wanted, or in a form we are likely to use". Mr and Mrs SH refer to their "questioning a number of respects of what was being proposed" with responses that led to unsatisfactory results.

[47] Mr TC responded to the complaint on 22 April. He made the following points:

(a) Trust C was wholly inadequate in form and substance. It could not be "backdated".

(b) The proposed Trust D set out his understanding of Mr and Mrs SH's wishes.

(c) Ancillary steps involving Trust A and Trust B were necessary to achieve fairness and provide maximum protection.

[48] Mr TC followed this letter up with a further letter dated 8 May seeking instructions, together with payment of his March invoice. Mrs SH responded in an email to Mr TC dated 10 May, into which Mr TC interpolated his further comments and

[2] At [5].

returned Mrs SH's email to her. The following emerge from the email and interpolations:

(a) The parties only met once, in late June 2012. At that meeting Mr TC raised the issue of combining Trust A and Trust B and the Trust C, which Mrs SH indicated at the time "was an idea worth thinking about".

(b) Based upon that, Mr TC set about preparing the documents necessary to give effect to this, including the creation of Trust D.

(c) Mr TC was unable to provide an estimate when asked because he did not have full details of the assets and liabilities of Trust A and Trust B.

(d) Mr TC did not accept the criticisms that his proposals disadvantaged any party or were otherwise contrary to the SH's wishes.

The Complaint and response

[49] Mr and Mrs SH lodged a complaint with the New Zealand Law Society Complaints Service on 6 June 2013.

[50] The substance of the complaint was that Mr TC had:

(a) Failed to act on instructions.

(b) Embarked on a proposal for organising their financial affairs which failed to reflect their instructions.

(c) Failed to provide adequate information.

(d) Failed to provide an estimate of fees.

(e) Brought an unnecessary complexity to the issues.

(f) Completed work that was of no material value to Mr and Mrs SH.

[51] In response, Mr TC submitted that:

(a) He did not fail to protect the interests of his clients.

(b) He had not engaged in conduct that was misleading or likely to mislead or deceive.

(c) He had given full effect to the instructions received. He noted that those instructions were that:[3]

> because of [the SH's] new relationship they wished the children of both of them to be beneficiaries of a new trust which on winding up would treat the children of each of them equally.

Standards Committee Processes and Decision

Assessor's report

[52] As part of its inquiry into Mr and Mrs SH's complaint, the Standards Committee appointed a costs assessor to provide a report commenting on Mr TC's fee, and whether that was fair and reasonable for the services he provided. The assessor's delegation included request for "comments about anything else arising out of [the inquiry] which might assist the Standards Committee in reaching a properly informed decision about the fee complaint".[4]

[53] In his report dated 30 January 2014, the assessor made the following comments:

(a) Mr TC's fee should be reduced by $2,489.00 plus GST. This on the basis that no further work should have been undertaken after 15 December 2012, when Mr and Mrs SH asked Mr TC to review and consider his fees.

(b) A fee of $15,000 plus GST was fair and reasonable.

(c) Mr TC's proposals, although appearing complex, were "in fact the correct solution to the issue that had arisen".[5]

(d) Mr G's error with Trust C gave rise to the need for an overall estate planning exercise which was, as described by Mr TC, a "restructuring" of Mr and Mrs SH's affairs.[6]

(e) Mr TC's explanations to Mr and Mrs SH were "not communicated in a manner that the reasoning behind the documentation could be easily and simply understood".[7]

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[3] Letter Mr TC to Complaints Service (3 July 2013) at [6].
[4] Letter DA to SW (5 December 2013).
[5] Cost Assessor's report, 30 January 2014 at [11].
[6] At [15].
[7] At [17].

(f) Only one initial meeting was inadequate.

[54] Mr and Mrs SH provided comment about the assessor's report, as follows:

(a) Had they received an initial estimate as requested, in which fees of the magnitude charged were indicated, they would not have proceeded with the retainer.

(b) Despite asking for one, Mr and Mrs SH never received a fees estimate from Mr TC.

(c) Mr TC's solution to the problem with Trust C, endorsed by the assessor, was not the only one. Mr G ultimately engaged another lawyer at his cost ($3,000) to provide the solution that the couple were looking for.

(d) It is still unclear why Mr TC recommended the merging of two trusts (Trust A and Trust B) into a new and third trust (Trust D).

[55] The Committee resolved to set the complaint down for a hearing on the papers.

Preliminary views of the Standards Committee

[56] In its notice of hearing dated 25 March 2014, the Committee distilled the issues to be considered as:

(a) Were Mr TC's fees fair and reasonable?

(b) Did Mr TC take steps to ensure that Mr and Mrs SH understood the nature of his retainer?

(c) Did Mr TC fail to consult Mr and Mrs SH about the steps to be taken?

(d) Did Mr TC undertake work that was outside of his instructions?

(e) Did Mr TC fail to provide an estimate when requested?

[57] At a meeting on 14 April the Committee reached a preliminary view that there had been unsatisfactory conduct by Mr TC but considered that "it may be possible to adequately resolve [the] complaint if [Mr TC waived] the fees rendered".[8]

[8] Letter Complaints Service to Mr TC (17 April 2014).

[58] Through Counsel, Mr PP, Mr TC indicated that he was happy to attend mediation but that the fees to be waived would be "the fees in respect of the work disputed".[9]

[59] Mr and Mrs SH indicated to the Complaints Service that they would pay for the initial one hour consultation with Mr TC, which took place on 28 June 2012, on the understanding that "the substantial file [they] left with Mr TC to assist him, will be returned".[10]

[60] Ultimately Mr and Mrs SH concluded that because of the impasse over fees – their view being that no more than one hour was owed – there was no point in the parties attending mediation.

[61] The matter was thus referred back to the Committee for hearing and determination.

[62] Prior to the hearing Mr PP provided further brief submissions to the Committee.[11] They may be summarised as follows:

(a) The parties met on 28 June 2012. At that meeting Mr and Mrs SH's instructions were "a trust structure which ultimately provided for equal sharing by all children".

(b) By 9 July Mr TC had provided Mr and Mrs SH with a lengthy explanatory letter and supporting documents.

(c) There followed exchanges of correspondence between the parties.

(d) On 29 November Mr TC indicated his fees to date; issue was taken with Mr TC's work on 15 December, for the first time.

(e) There had been no request for an estimate prior to Mr and Mrs SH's letter to Mr TC on 15 December.

Hearing and Decision

[9] Letter Mr PP to Complaints Service (7 May 2014).
[10] Letter Mr and Mrs SH to Complaints Service (17 May 2014).
[11] Letter Mr PP to Complaints Service (31 July 2014).

[63] In its decision delivered on 29 September 2014, the Committee refined the issues to be considered as being:

(a) Should it proceed with the hearing?

(b) Did Mr TC undertake work that was outside his instructions?

(c) Were Mr TC's fees fair and reasonable?

(d) Did Mr TC fail to provide an estimate when requested to do so?

[64] The issue of whether the Committee ought to proceed with the hearing arose because of a request that Mr PP had made on Mr TC's behalf, to make further submissions. The Committee concluded that there had been sufficient opportunity for the parties to provide submissions and that it was appropriate to proceed with the hearing.[12]

[65] As to the remaining three issues, the Committee concluded that:

Work outside instructions:[13]

(a) Mr TC acted outside his instructions. Trust C issues were a fundamental part of his retainer. The work that Mr TC undertook in establishing Trust D was outside of his retainer.[14]

(b) It was not satisfied that a concluded agreement had been reached following the initial meeting as to the nature of the instructions.

(c) Mr TC had not received instructions to undertake a comprehensive resettlement of the assets. Although Mr TC approached the matter in a way that he considered to be in Mr and Mrs SH's best interests, it was not a matter for his sole judgement.

(d) Mr TC should have ensured that the terms of his retainer were understood. The suggestion of merging all trusts into one was discussed at this meeting and Mr and Mrs SH agreed to consider this subject to receiving an estimate, but their preferred option (which was likely to have been cheaper and simpler) was the creating of a fourth trust to replace Trust C.

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[12] Standards Committee decision at [11].
[13] Generally at [25].
[14] At [17].

(e) Mr TC was required to obtain a clear mandate to undertake the work. Mr TC did not receive instructions to undertake an immediate and comprehensive resettlement of all of Mr and Mrs SH's assets. They ought to have received further advice.

(f) Mr TC acted without instructions and failed to take reasonable steps to ensure that his clients were informed. The 9 July letter does not meet Mr TC's obligation to properly explain the nature of the retainer.[15]

Fair and reasonable fees:[16]

(g) The total fees charged did not reflect Mr and Mrs SH's instructions. A fair fee was $646 plus GST and disbursements.

Estimate:[17]

(h) Mr TC was asked to provide an estimate at the initial meeting, but this did not warrant any disciplinary response.

[66] The outcome was:[18]

(a) Mr TC's conduct amounted to unsatisfactory conduct (with the exception of his failure to provide an estimate when asked to do so).

(b) His fee was reduced to $646 plus GST and disbursements.

(c) A censure was imposed.

Application for Review

[67] On 3 November Mr TC applied to review the Committee's decision. He submits that:

(a) Work undertaken was in accordance with his instructions.

(b) The conduct did not constitute unsatisfactory conduct.

(c) The Committee's decision was wrong in fact and law.

[15] At [21].
[16] At [26] – [29].
[17] At [30] – [32].
[18] At [33].

(d) The Committee's failure to allow opportunity for him to provide further submissions constituted a breach of natural justice (the procedural challenge).

(e) Penalties imposed were excessive and disproportionate.

[68] By way of remedy, Mr TC sought to have the Committee's decision quashed, and the issue of fees to be addressed.

[69] In response to Mr TC's application, Mr and Mrs SH submit that:

(a) They had no interest in the unsatisfactory conduct finding.

(b) Their concerns related to the fees charged.

(c) They agree with the Standards Committee decision.

(d) Terms of engagement were not provided for their consideration, until the work charged was close to completion.

(e) Work completed did not accord with their instructions and failed to meet their needs.

Nature and scope of review

[70] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[19]

> … 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.

[19] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

[71] More recently, the High Court has described a review by this Office in the following way:[20]

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

[72] 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:

[73] Consider all of the available material afresh, including the Committee's decision; and

[74] Provide an independent opinion based on those materials.

The Hearing

[75] A hearing, attended by Mr TC and his counsel took place on 14 April 2015.

[76] Subsequent to that hearing, I became concerned that it appeared to be the case that as a consequence of an administrative oversight, Mr and Mrs SH may not have received notice of the hearing.

[77] I considered it appropriate to reconvene the hearing and allow opportunity for Mr and Mrs SH to attend. That hearing was reconvened on the 4 November 2015, and commenced with Mr and Mrs SH being provided with a comprehensive summary of the arguments advanced on behalf of Mr TC at the earlier hearing.

[78] In addition, I record that all written submissions filed by the parties, including the submissions filed by Mr TC's counsel at the initial hearing have been considered.

Analysis

Discussion

[79] At its heart, this is a complaint about Mr TC's fees. That complaint has arisen because Mr and Mrs SH assert that Mr TC did not carry out their instructions. That

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

issue is more properly framed as whether Mr TC took steps to confirm his instructions and Mr and Mrs SH's understanding of those instructions.

[80] On any view of it, the work carried out by Mr TC between July 2012 and March 2013, when the retainer was terminated, was comprehensive and extensive. Significant attention was paid to detail. Work was completed efficiently and Mr TC was diligent in following matters up with Mr and Mrs SH. Queries from them were dealt with promptly.

[81] There seems no doubt also that Mr TC's work was careful, thorough and competent, and reflected the skill of someone who had worked in and was very familiar with the field of asset protection generally, and family trusts specifically.

[82] This view was reinforced by the costs assessor appointed by the Standards Committee. His conclusion was that the work completed by Mr TC reflected the only solution to the problem faced by Mr and Mrs SH in June 2012. They had separate family trusts formed before their relationship began largely benefitting their respective children; they had jointly acquired assets during their relationship and had an incomplete trust (Trust C) which, in reality, provided minimal protection and did not reflect their wishes.

[83] The fault for this state of affairs seems to rest fairly and squarely with Mr G, who had been instructed to prepare the documents and undertake the steps necessary to formally set up Trust C. Mr G apparently recognised his failures in that regard, and recommended that Mr and Mrs SH go elsewhere. It was this that led them to Mr TC.

[84] Despite the assessor's views – self-described as "a senior lawyer conversant with issues [raised by the complaint]" – Mr and Mrs SH maintain that they subsequently accomplished what they claim always to have wanted: the retention of Trust A and Trust B and the creation of Trust C. This was done at Mr G's cost by another lawyer, for $3,000.

[85] Apart from that comment by Mr and Mrs SH, in responding to the Committee about the assessor's report, no other detailed critique of either Mr TC's work or the assessors views about that work, has been advanced.

[86] Whether the structures ultimately proposed by Mr TC were what Mr and Mrs SH anticipated when they had the 28 June meeting, is of marginal relevance in my view. Neither was an expert and both recognised Mr TC's expertise. A client may have a view about how their legal issues may be resolved, but those views may be unrealistic or plain wrong.

[87] I conclude from the information available to me, which includes an independent cost assessor's report prepared by someone experienced in this area, that Mr TC's work throughout was competent and reflected a proper response to the needs of Mr and Mrs SH, as they were explained to Mr TC at the June 2012 meeting.

[88] No real challenge has been laid to the assessor's opinion that Mr TC's fees were fair and reasonable for the work that he did (with the exception of work done after challenge was raised in December 2012). If that was the only issue to consider, then it would be difficult to mount argument that Mr TC's fees were unfair and unreasonable.

[89] However, the issue of whether the fees were in fact fair and reasonable is directly linked to the issue of his instructions. The difficulties for Mr TC are as follows:

(a) His lack of any estimate despite being asked for one on 28 June. This affects but is not determinative of the issue of whether his fees were fair and reasonable.

(b) The scope of his instructions and Mr TC's alleged failure to properly explain the steps he was taking. This too affects the issue of whether his fees were fair and reasonable.

[90] I will deal with each in turn.

Estimate

[91] Mrs SH said that she asked Mr TC for an estimate of his fees when they first met him in June 2012. That was an entirely reasonable request, of the type that most lawyers would receive during an initial consultation.

[92] It is clear that Mr TC did not provide an estimate – either on or shortly after the initial consultation on 28 June (or indeed at any time thereafter). The Standards Committee came to that conclusion, but also held that the failure to do so did not warrant a disciplinary response.[21]

Rule 9.4

[93] Rule 9.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 is clear:

> A lawyer must upon request provide an estimate of fees and inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded.

[21] Above n 12 at [32].

[94] Once a client asks their lawyer to provide an estimate then the lawyer must provide one. I do not read rule 9.4 as requiring a lawyer to provide an estimate immediately upon request, as this would be unreasonable in many circumstances.

[95] In all walks of life people ask for and rely upon estimates before making decisions about whether to spend money on a project. In lawyer client relationships estimates enable clients to make informed decisions about the nature and extent of a lawyer's retainer.

[96] Mr TC's response to this issue of complaint was that he could not provide an estimate, because at 28 June he had no idea about the assets and liabilities of Trust A and Trust B, and no understanding of the extent to which Trust C was operational. This in my view is a fair objection to make.

[97] However, once the scope of the work to be done began to take shape, I consider that Mr TC was obliged to provide the requested estimate.

[98] It is difficult to say with any degree of certainty precisely when Mr TC should have provided Mr and Mrs SH with an estimate, however I consider that, at the latest, by the time that Mr TC had sent Mr and Mrs SH his letter and documents on 9 July 2012 he ought to have been in a position to provide them with an estimate of fees. Substantial work had been done by then and a practitioner with Mr TC's undoubted experience should have been able to give indication of fees by that date.

[99] Matters were not clarified in Mr TC's letter and terms of engagement, sent on 13 August, which failed to mention his hourly rate and did not make any reference to an estimate. Moreover, the letter indicates that he would invoice Mr and Mrs SH monthly. He did not do so.

[100] Mr and Mrs SH maintain that had they received an estimate at an early stage of the retainer, indicating fees of up to $15,000, then they would not have taken matters further and would have gone elsewhere looking for a cheaper option.

[101] I have reservations about the certainty with which that is expressed. By 28 November 2012 Mr and Mrs SH had received substantial documentation and advice from Mr TC, across several pieces of correspondence from him. It must have been apparent to Mr and Mrs SH that Mr TC had undertaken substantial work on their behalf. Concern about that work was not raised until 28 November, by which time the retainer had been on foot for exactly five months.

[102] Mr TC's reply sent on 29 November included his indication that fees had reached $15,000, but issue was not taken with that in their email to Mr TC on 15 December. Mr and Mrs SH simply asked for an estimate of further fees to conclude matters.

[103] However Mr TC did not respond to that request, either.

[104] As noted, Mr TC did not ever provide an estimate. In March 2013 he produced and sent an invoice.

[105] I do not intend to depart from the Committee's approach that this particular breach does not require a disciplinary outcome. However Mr TC's failure to provide an estimate when requested (twice), together with his failure to invoice monthly as he had indicated he would, contributes to an assessment of whether his total fees of $17,489 plus GST and disbursements were fair and reasonable. Those issues do not by themselves determine that question, but they contribute to an overall assessment of the fees.

[106] The second issue – whether Mr TC had conducted work outside the scope of his instructions – assumes greatest importance when assessing Mr TC's fees.

[107] Allied to the scope of instructions issue, is whether Mr TC sufficiently engaged with his clients during the retainer in a way that ensured that Mr and Mrs SH understood the nature of the retainer and could provide Mr TC with meaningful instructions.

Scope of instructions

[108] I have already concluded that the work carried out by Mr TC was to a high standard and properly met the legal needs of Mr and Mrs SH. The assessor observed that it was correct for Mr TC to have described the retainer as one involving "restructuring [Mr and Mrs SH's] affairs".[22]

[109] I do not, for the purposes of this decision, accept the contrary view expressed by Mr and Mrs SH that their legal needs were equally protected by the work subsequently done at the initiative of Mr G. There is simply no independent evidence of this, as, for example, the assessor provided in relation to the work carried out by Mr TC.

[22] Above n 5 at [15].

[110] However, the fact that his work was competent and met the clients' needs does not answer the question of whether Mr TC exceeded the scope of his instructions.

[111] I consider that this question is best answered by a consideration of the extent to which Mr TC adequately explained his advice. This engages a consideration of rule 7.1, which I now discuss.

Rule 7.1

[112] Rule 7.1 reads:

> A lawyer must take reasonable steps to ensure that a client understands the nature of the retainer and must keep the client informed about progress on the retainer. A lawyer must also consult the client ... about the steps to be taken to implement the client's instructions.

[113] A significant feature of this retainer is the fact that the parties only met once, and then for one hour.[23] Moreover, there did not appear to have been any telephone contact between them during the retainer. Yet this was complex, technical and detailed work involving several different transactions to perfect Trust D. It included a consideration of accounting issues. No opportunity was provided to consider other options.

[114] Mr and Mrs SH complain that when eventually they were able to turn their minds in a meaningful way to the documentation (including Mr TC's written advice) in late November 2012, it occurred to them that matters were far different from what they had anticipated. By then the retainer had been on foot for exactly five months and extensive correspondence had been sent by Mr TC.

[115] Not all of that correspondence was answered by Mr and Mrs SH, nor answered promptly. It was not their obligation to do so – but their delays required Mr TC to send what he has described as "gentle reminders".

[116] Included amongst the correspondence sent by Mr TC were several different documents requiring separate and joint signatures from Mr and Mrs SH and from Mr G. Each document was an essential part of the several transactions required to accomplish what Mr TC was setting out to do.

[117] The assessor noted the following:

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[23] See Mr TC's timesheet.

> 17. The difficulty that has occurred is in the communication of, and the understanding, of the advice. It appears, from the papers that Mr TC has not appreciated that his advice whilst in my opinion is correct, was not communicated in such a manner that the reasoning behind the documentation could be easily and simply understood.

[118] The first letter of significance from Mr TC to Mr and Mrs SH was his of 9 July. Attached to that letter were some 11 documents. This was clearly an important letter as it contained the basic building blocks of Mr TC's advice to Mr and Mrs SH.

[119] The documents attached to that letter involve different transactions, including obtaining Mr G's signature. Individual documents within the bundle are lengthy. Mr TC's timesheets show that he spent 14.2 hours drafting and finalising those documents. At his hourly rate, this produces a fee of $6,390 plus GST.

[120] The assessor – an experienced lawyer in this area – agreed that the work done by Mr TC was complex and at its heart "an estate planning exercise which affects all matters including wills and ensuring correct ownership is recorded especially with respect to real property".[24]

[121] The assessor also described the implications of Mr G's default with Trust C and the work required to rectify that and give proper effect to Mr and Mrs SH's wishes, as "far-reaching".[25]

[122] I have carefully read Mr TC's letter to Mr and Mrs SH dated 9 July 2012. Although Mr TC has undoubtedly worked diligently and promptly on the retainer, the relative brevity of the letter belies the complexity of what he was advising his clients to do.

[123] I consider that there is a significant disconnect between the parties' meeting on 28 June (which, according to Mr TC's time records, lasted for one hour), and the level of detail which comprises the 9 July letter and attachments.

[124] As indicated, circumstances such as these engage the obligations contained in rule 7.1. I deal now with when those were triggered. I will consider this issue in conjunction with Mr TC's letter and terms of engagement.

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[24] Above n 5 at [15].
[25] At [19].

Terms of engagement

[125] Apart from a letter seeking follow-up instructions dated 9 August, the next event of significance after his 9 and 19 July letters to Mr and Mrs SH, occurred when on 13 August Mr TC sent his letter and terms of engagement to them.

[126] I have earlier noted the lack of any reference to Mr TC's hourly rate in that material, and the reference in it to his practice of monthly billing.

[127] Apart from a generic description of the scope of Mr TC's work, neither his letter nor his terms of engagement describe the work that he had been instructed by Mr and Mrs SH to undertake.[26] I consider that this does not meet the requirements of rule 7.1, in particular the obligation to ensure that a client "understands the nature of the retainer".

[128] Rule 3.4 requires a lawyer to "in advance, provide a client with information in writing on the principal aspects of client service ...". Rule 3.4 sets out the type of information to be addressed in what are commonly referred to as terms of engagement.

[129] The footnote to rule 3.4 recommends that a lawyer should provide this information "prior to commencing work under a retainer". However this is not an absolute requirement as in some circumstances a lawyer may be required to take urgent steps on behalf of a client.[27]

[130] Although there was a degree of urgency about the matters raised by Mr and Mrs SH due to the incomplete nature of Trust C, in my view, matters were not so urgent that Mr TC could not have prepared and sent his letter and terms of engagement in the days following the 28 June meeting. His next communication was ten days later on 9 July, and I consider there to have been ample opportunity for Mr TC to ensure compliance with rule 3.4 before that date.

[131] Compliance with rule 3.4 would also have engaged a consideration of rule 7.1, which in turn should have led to Mr TC describing in appropriate detail the nature of his instructions and the scope of his retainer, in his letter and terms of engagement.

[132] I conclude that Mr TC breached both rule 3.4 and 7.1 by his failure to provide sufficiently detailed information about the nature of his retainer, ensuring that Mr and Mrs SH understood what he was proposing to do on their behalf.

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[26] See Standard Terms of Engagement at [2].
[27] *McGuire v Manawatu Standards Committee* [2016] NZHC 1052.

[133] These matters were substantial and were designed to have binding and long term effect. They involved property ownership rights and a consideration of respective contributions. Comprehensive discussion and explanation about these matters was called for. This is particularly so when the arrangements proposed by Mr TC differed so dramatically from those that were in existence, and which Mr and Mrs SH were seeking to regularise.

[134] Given that there had been no letter or terms of engagement by 9 July, I do not consider that Mr TC's letter of that date meets the requirements of rule 7.1. The process of ensuring understanding and agreement ought to have occurred in one or more face to face meetings, or across exchanges of correspondence before significant document drafting was undertaken.

Conclusions as to scope of instructions

[135] I conclude:

(a) Mr TC breached rule 3.4 by not providing client information in advance of his retainer or within a reasonable time of commencement of his retainer. A delay of five to six weeks is unacceptable.

(b) The terms of engagement do not comply with the obligation in rule 7.1 to provide information which ensured that Mr and Mrs SH understood the nature of the retainer.

(c) In any event rule 7.1 was fully engaged at the time or shortly before Mr TC sent his letter and documents to Mr and Mrs SH on 9 July.

[136] I do not agree that by their lack of any queries about the contents of that letter, Mr and Mrs SH can be taken to have understood what was being proposed and asked of them. The obligation is the lawyer's to ensure that clients understand the work that is being done on their behalf.

[137] I note that Mr and Mrs SH provided additional information to Mr TC shortly after he sent his letter of 9 July, and that this was followed up by Mr TC with another letter dated 19 July. This letter contained further documents as part of the process

towards finalising Mr TC's planned outcome for his clients. However, in my view this letter also suffers from being technical and in parts equivocal.[28]

[138] In his letter of 19 July Mr TC raises the question of Mr and Mrs SH's wills. This was discussed at the 28 June meeting (according to Mr TC's timesheet) though amongst the overall restructuring discussions.

[139] I consider that further and separate meetings were appropriate for discussion and advice about Mr and Mrs SH's wills.

[140] Finally, if ever there was any doubt in Mr TC's mind about the scope of his instructions and the level of Mr and Mrs SH's understanding, the exchanges of correspondence between the parties in late November and mid-December should have made it clear to him that they were at cross-purposes. Mr and Mrs SH did not in fact read the documents that he had been sending them since 9 July, until the end of November.

A reasonable fee

[141] I have concluded that Mr TC did not provide an estimate when requested to do so, in breach of rule 9.4.

[142] I have also held that Mr TC was in breach of rule 3.4 by not providing his terms of engagement prior to (or within a reasonable time of) the commencement of the retainer. I have concluded that the terms provided do not comply with rule 7.1.

[143] I have held that by 9 July 2012 Mr TC was in breach of rule 7.1 by not providing adequate explanation to Mr and Mrs SH about the detailed transactions he was asking them to complete, and their significance.

[144] I largely discount Mr and Mrs SH's claims that they would not have followed through with the retainer had they appreciated the extent of the work. The simple fact is that rule 7.1 obliged Mr TC to ensure that they understood the nature of the retainer, at the earliest possible opportunity. That opportunity was there before 9 July 2012.

[145] In their complaint Mr and Mrs SH indicated that they were willing to pay the sum of $196 plus GST for a survivorship transmission document that Mr TC had

[28] For example, at [5] of his 19 July letter Mr TC raises without answering an issue about the need for Trustee resolutions.

prepared.[29] In subsequent submissions to the Complaints Service they indicate that they would be prepared to pay for their 28 June consultation with Mr TC, being $450 plus GST. The total of these amounts is $646 plus GST ($742.90).

[146] Based upon this, the Committee determined that a fair and reasonable fee was $646 plus GST and disbursements.[30] Those disbursements would appear to be a $20 search fee, referred to in Mr TC's invoice dated 19 March 2013.

[147] The Committee did not adopt the assessor's recommendation that the fees up to 15 December were fair and reasonable and thus properly payable by Mr and Mrs SH.[31] The Committee concluded that all work (beyond the initial meeting and the $196 concession made by Mr and Mrs SH) was outside the scope of Mr TC's instructions and had not been properly explained to them.

[148] I have come to the same conclusion as the Committee about the scope of Mr TC's retainer. Mr TC's work was undoubtedly competent, thorough and comprehensive. He was efficient and prompt. However, by his enthusiasm and diligence Mr TC omitted the key step of ensuring that he was doing what Mr and Mrs SH had in mind, and that they understood what he was doing.

[149] It was optimistic for Mr TC to expect that he could embark upon this sophisticated restructuring exercise on the back of a single one-hour meeting.

[150] The Committee's basis for reducing the fee to the amount that it did, is principled and I can find no fault with it.

Procedural challenge

[151] I deal finally with Mr PP's procedural challenge to the Committee's decision. In short, this was that the Committee did not allow Mr TC full opportunity to put matters before it when it declined Mr PP's request to make further submissions.[32]

[152] This point can be disposed of briefly.

[153] A Review Officer has broad powers in conducting a hearing. The Officer may conduct the review with minimal formality and technicality, exercise all powers as are

[29] Complaint to the Complaints Service (6 June 2013) at [21].
[30] Above n 12 at [33](b).
[31] Above n 5 at [8].
[32] Above n 12 at [11].

reasonably necessary to carry out their functions and exercise the powers of a Standards Committee.[33]

[154] As well, I am required to bring a fresh, independent and robust view to the complaint, the Committee's decision and the application for review.

[155] In approaching the hearing in this way, I confirm that I have carefully and comprehensively considered all of the material that was provided to the Standards Committee and to this Office on review. I have paid particular attention to the issues raised by Mr PP in his submissions to me, and which may not have been before the Standards Committee.

[156] All of those matters have been taken into account by me in considering Mr TC's application for review. Any error by the Committee in not allowing Mr TC further opportunity to make submissions has been overcome by the comprehensive nature of an application for review.

Conclusion

[157] I agree with the Committee's findings of unsatisfactory conduct. Whereas the Committee did not specifically identify the rules breaches upon which these findings were made, I identify them as being:

(a) Rule 3.4: Failure to provide adequate information about the retainer in advance or within a reasonable time of it commencing.

(b) Rule 7.1: Failure to take reasonable steps to ensure that Mr and Mrs SH understood the nature of the retainer.

[158] For completeness I have considered the initial approach contemplated by the Committee, namely that the parties might agree to a fees outcome and thereby dispose of the complaint without the need for disciplinary findings. No doubt the Committee was motivated in this approach by the fact that Mr and Mrs SH were principally seeking relief from having to pay a fee they had not remotely anticipated. Because the parties could not agree on how to frame a fees mediation, for reasons it is not necessary for me to traverse, the matter required a determination.

[33] Lawyers and Conveyancers Act 2006, ss 200, 202 and 211(1)(b).

[159] Findings of unsatisfactory conduct were a necessary part of the Committee's decision to reduce Mr TC's fees.

[160] I have considered whether, when looked at from the perspective of Mr TC having otherwise provided competent advice, this matter calls for a disciplinary outcome. Such is possible in cases where breaches by lawyers have been seen as technical and the circumstances do not otherwise call for a disciplinary outcome.

[161] However I consider that the rule breaches in this case are not technical or trifling. They go to the heart of a client's right to understand the work that is being done, and its consequences for them. The breaches involve the failure to provide basic and essential information.

[162] In addition, the legislation does not permit a Standards Committee or this Office to reduce a lawyer's fees without first making a finding of unsatisfactory conduct. It is appropriate in this case for the fees to be reduced.

[163] Accordingly, the findings of unsatisfactory conduct must stand.

[164] Apart from a censure, the Committee adopted a merciful approach and imposed no other penalty. I agree with that approach. Mr TC is a senior and very competent lawyer, recognised for his expertise in this difficult area of the law. This issue has arisen towards the end of his career. The reduction of his fees by well over 90 per cent is significant.

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is modified by the addition of the rules breaches referred to in [157] above but is otherwise confirmed.

DATED this 28TH day of April 2017

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 TC as the Applicant
Mr and Ms SH as the Respondent
Mr PP as the Representative for the Applicant
[Area] Standards Committee X
The New Zealand Law Society