LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 099

Ref: LCRO 239/2020

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**DP** Applicant
AND	**FJ obo RK** Respondent

DECISION

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

Introduction

[1] Mr DP has applied to review a determination by the [Area] Standards Committee [X], in which the Committee made findings of unsatisfactory conduct against him, fined him, ordered him to pay costs, cancel invoices, refund fees and take practice management advice.

Background

[2] In 2018 Mr RK was employed in the restaurant and hospitality sector in New Zealand under a temporary work visa, which was due to expire in February 2020.

[3] Mr RK and his family were anxious to obtain permanent residence status in this country.

[4] In or about August 2018, Mr RK approached and spoke to Mr DP about how he might acquire residence status.

[5] Mr DP described two pathways for that to occur. The first was under Immigration New Zealand's (INZ) Skilled Migrant category, and the second was under the Long Term Skills Shortage (LTSS) category as a chef.

[6] The Skilled Migrant category required minimum standards in English (a minimum IELTS test score).

[7] Mr DP determined that Mr RK's English was poor and that he was unlikely to obtain the necessary IELTS qualification. He advised Mr RK that the better pathway for him and his family to acquire residence status in New Zealand, was through the LTSS process.

[8] The LTSS process required Mr RK to have a chef qualification recognised by the New Zealand Qualifications Authority (NZQA). Although Mr RK had chef qualifications, they did not meet the NZQA standard.

[9] Mr DP recommended a vocational service provider in [city], Australia, in which Mr RK could enrol and obtain sufficient relevant credits which, together with his other chef qualifications, would be recognised by NZQA (the pre-visa steps).

[10] At the time, there were no appropriate vocational service providers in New Zealand.

[11] The Australian vocational service provider, [School] ([School]) charged costs of AUD$1,800.

[12] Mr DP advised Mr RK that once the chef qualifications were recognised by the NZQA, he could apply to INZ for a Work to Residence visa (WRV) under the LTSS category. After two years under that visa he (and his family) would be eligible for a Residence from Work visa.

[13] Mr RK instructed Mr DP to proceed as he had recommended.

[14] Mr DP informed Mr RK that legal fees would be in three tranches: $6,000 plus GST for the pre-visa steps; $6,000 plus GST and disbursements for the WRV application and $6,000 plus GST and disbursements for the Residence from Work visa application.

[15] Mr DP and Mr RK signed a template form used by Mr DP for legal fees, described as "Legal Fees and/or Disbursement Payment Agreement" (the fees agreement form). They also verbally agreed that Mr RK could pay the agreed legal fees by instalments as work progressed.

[16] Mr RK successfully completed the pre-visa steps and had his chef qualifications recognised by NZQA.

[17] In or about May 2019, Mr DP lodged a WRV application on Mr RK's behalf with INZ, and paid the necessary filing fee to INZ ($1,616).

[18] INZ formally raised two separate queries about the WRV application;[1] specifically questioning whether Mr RK's qualifications were of the lesser "cook" rather than the "chef" category. If deemed to be so, this was not one of the eligible categories and Mr RK's WRV application would be declined.

[19] Mr DP responded to both PPI letters, submitting that Mr RK's qualifications were clearly "chef" and not "cook".

[20] In July 2019, INZ formally declined Mr RK's WRV application.

[21] On Mr RK's behalf, in early August 2019, Mr DP lodged a Reconsideration Application with INZ in relation to the WRV. He paid the necessary filing fee of (approximately) $320.

[22] Mr RK sought advice elsewhere, and endeavoured to uplift his file from Mr DP.

[23] Disagreements arose about legal fees paid and owing.

Complaint

[24] On Mr RK's behalf, his sister Ms FJ lodged a complaint with the New Zealand Law Society Complaints Service (Complaints Service) on 1 October 2019. The substance of the complaint was that:[2]

(a) Mr DP quoted fees of $6,000 plus GST for the pre-visa work.

(b) Mr DP also quoted $6,000 plus GST for the WRV application.

[1] Referred to as "PPI letters" or Potentially Prejudicial Information letters.
[2] Not all issues of complaint were upheld by the Committee. For the purposes of this review application, I will only set out and deal with the issues of complaint which resulted in findings of unsatisfactory conduct.

(c) The fees agreement form said that $3,000 of the WRV application fees were payable once the visa had been granted.

(d) Mr DP did not inform him that fees for the reconsideration application would be $3,000 plus GST.

(e) Mr DP refused to release Mr RK's files to Mr RK's new advisor, until a payment of $3,000 had been made.

[25] By way of outcome, Mr RK asked for "all [of] the [legal fees] to be waived."

[26] Attached to Mr RK's complaint form was a more detailed explanation of his complaint. He said:

(a) He has paid Mr DP a total of $10,350 "plus immigration fees and assessment fee" and $100 by way of "office charges".

(b) NZQA approved Mr RK's chef qualification on 15 December 2018.

(c) Mr RK's WRV application was declined on 22 July 2019.

(d) Mr RK met Mr DP following that, where he was advised about the option of applying for reconsideration. However Mr DP only referred to a $320 filing fee. He did not discuss legal fees, and "there was no new sign up for reconsideration."

(e) When the reconsideration application was declined, Mr RK requested his file from Mr DP. Mr DP declined to release the file until outstanding legal fees were paid.

[27] Mr RK provided a number of documents with his complaint, including a copy of the fees agreement form, copies of bank statements and invoices together with copies of emails between him and Mr DP.

Response by Mr DP

[28] Mr DP responded to the complaint as follows:[3]

(a) When Mr RK first instructed Mr DP in August 2018, his work visa was not due to expire until February 2020.

[3] Letter from Mr DP to the Complaints Service (21 November 2019).

(b) Mr DP advised Mr RK that the appropriate pathway to residence for him, was through the LTSS category and by lodging a WRV application.

(c) Mr DP determined that Mr RK's then qualifications did not reach the level of "chef", and so he assisted Mr RK to obtain that level of qualification through an Australian vocational service provider.

(d) NZQA approved Mr RK's qualification as "chef".

(e) In May 2019, Mr DP lodged Mr RK's WRV application. INZ issued two PPI letters, querying the chef qualification and suggesting that it was the lesser qualification of "cook". Issues were also raised about Mr RK's work experience.

(f) Mr DP responded to the two PPI letters and endeavoured to persuade INZ that Mr RK's qualification was appropriately that of "chef".

(g) Nevertheless, in July 2019, INZ declined Mr RK's WRV application.

(h) Mr DP advised Mr RK to lodge a reconsideration application with INZ, and Mr RK instructed Mr DP to proceed. Because of the urgency, nothing was put in writing.

(i) The reconsideration application was also declined. Mr RK was unhappy about this, and eventually sought advice elsewhere.

(j) The fees agreement form comprehensively sets out the agreement reached between Mr DP and Mr RK about legal fees for the various stages of the legal work towards Mr RK obtaining a residence visa.

(k) Mr RK "fully understood and agreed to fees and costs in advance."

Comment by Mr RK

[29] Mr RK commented on Mr DP's response as follows:

(a) The fees agreement form clearly stated that "legal fees [payable] upon approval shall be paid only visa is approved."

(b) Mr DP did not inform Mr RK that fees were payable if his visa was declined.

(c) Mr DP insisted on lodging the reconsideration application, but did not mention legal fees. Mr RK was "already disappointed and agreed on whatever Mr DP said."

Notice of Hearing

[30] The Committee issued the parties with a Notice of Hearing, outlining the issues it was inquiring into and inviting submissions. Relevantly those issues were:

(a) Whether Mr DP failed to provide Mr RK with adequate information on the principal aspects of client services, including but not limited to the way the contingency fee(s) would … be charged. The Committee identified rr 1.6, 3.4 and 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) as being engaged by this issue.

(b) Whether Mr DP charged Mr RK more than a fee that was fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in r 9.1 of the Rules. The Committee identified rr 9, 9.1 and 9.2 of the Rules as being engaged by this issue.

(c) Whether Mr DP applied for reconsideration of the declined WRV application without being instructed to do so, and if so, whether he breached rr 3 and/or 7.1 of the Rules.

Responses to the Notice of Hearing

Mr DP

[31] In a memorandum dated 18 June 2020, Mr DP provided a lengthy response to the Committee's Notice of Hearing. In large part, he repeated what he had said in his initial response to Mr RK's complaint, but the following matters bear setting out:

(a) Mr RK fully understood and agreed to the fees involved in advance, and there was no undue pressure in his decision-making process.

(b) INZ was wrong to have concluded that Mr RK's qualification was the equivalent of a cook rather than a chef.

(c) The reconsideration application was made following a full discussion with Mr RK and his explicit instructions to proceed.

(d) The fees agreement form clearly outlined the arrangements about fees, GST and disbursements that had been agreed between Mr DP and Mr RK. The arrangements were for "a fixed fee covering all services rendered" and "there was no contingency agreement for Mr RK."

(e) Mr DP agreed to allow Mr RK to make payments towards fees and disbursements, by instalments.

(f) A "simple clerical mistake" was made when completing the fees agreement form, whereby Mr DP omitted to delete the reference to fees being payable only on visa approval by INZ. Mr RK was nevertheless aware that legal fees were payable irrespective of visa outcome.

(g) Mr RK paid Mr DP a total of $12,426 towards fees, GST and disbursements.

(h) Fees charged were fair and reasonable and reflected the extensive work done on Mr RK's behalf.

Standards Committee decision

[32] The Standards Committee delivered its determination on 10 November 2020. It identified a number of issues arising out of Mr RK's complaint which required determination. I will set out below the issues identified by the Committee and which are relevant to Mr DP's review application:[4]

> *Provision of Information*
>
> a. Whether Mr DP failed to provide Mr RK with adequate information on the principal aspects of client services, including but not limited to the way the contingency fee(s) would be charged (rr 1.6, 3.4 and 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)).
>
> *Fees*
>
> b. Whether Mr DP charged Mr RK more than a fee that was fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in r 9.1 [rr 9, 9.1 and 9.2 of the Rules].

[33] After setting out the relevant background and summarising Mr RK's complaint, the Committee considered each of the above issues in turn.

[4] Standards Committee determination at [21].

Provision of information

[34] The Committee said that it "was not satisfied that Mr RK was provided with adequate information at the beginning of the engagement, or when Mr DP subsequently applied for a reconsideration on his behalf."[5]

[35] Central to the Committee's reasoning was that the fees agreement form was "poor and confusing", and that the Committee "preferred Mr RK's account of how he understood the agreement."[6]

[36] The Committee went further and said that it "was left confused about the nature of the fee agreement and what was being proposed."[7]

[37] The Committee held that Mr DP had breached rr 1.6, 3.4 and 3.5 of the Rules, and that this was unsatisfactory conduct pursuant to ss12(a) and (c) of the Act.

Fees

[38] The Committee noted that it had "significant expertise in immigration matters and complaints" and that "it had the requisite experience to assess the reasonableness of the fees."[8]

[39] Next, the Committee set out rr 9 and 9.1 of the Rules, which relate to fees and how they should be assessed.

[40] In considering the fees agreement form, and comparing that to the invoices issued by Mr DP, the Committee expressed uncertainty as to whether Mr DP and Mr RK had entered into a contingency fee agreement.

[41] Earlier in its determination, the Committee had described Mr DP's documentation as "poor and confusing", to the extent that even the members of the Committee had difficulty understanding what the fees arrangements were.[9]

[42] The Committee focused on the fees charged by Mr DP for the pre-visa work ($6,000) and held that "this was not commensurate with the work that was undertaken or what would customarily be charged for similar services." It noted:[10]

---

[5] At [27].
[6] At [28].
[7] At [29].
[8] At [36].
[9] At [28] and [29].
[10] At [43].

> [S]uch assessments essentially are an administrative process, that is, the completion of a form outlining the applicant's overseas qualification and possibly including the relevant syllabus of that qualification. Costs for this application are often minimal and are frequently included in the costs of the main application.

[43] It was the Committee's view that "a fee of no more than $1,000" represented a fair and reasonable fee for the pre-visa work.[11]

[44] In relation to the reconsideration application, the committee held that the fee of $3,000 was neither fair nor reasonable, and directed that Mr DP cancel that fee. It held:[12]

> [T]he Committee considered the reconsideration process to be fairly straightforward and the associated fee should be relatively limited. Secondly, the Committee also had regard to the fact that there was no written instructions or agreement whereby Mr RK was expressly advised of these fees or that he consented to them.

[45] The Committee found that Mr DP had breached rr 9, 9.1 and 9.2 of the Rules, and that this was unsatisfactory conduct pursuant to ss12(a), (b) and (c) of the Act.

Penalties and orders

[46] The Committee referred to Mr DP's disciplinary history, noting that earlier findings of unsatisfactory conduct had been made against him "in relation to his billing practices" and for providing terms of engagement that were not fair and reasonable.[13]

[47] The Committee said that it "remained concerned about Mr DP's engagement processes, proposed fee arrangements, and billing practices." With that in mind, the Committee said that "it would be appropriate and in the interests of the public and the reputation of the legal profession for Mr DP to take advice on his practice in this respect.[14] The Committee directed Mr DP to "take advice in relation to the management of his practice at his own expense from TQ within six months from the date of [its] determination."[15]

[48] As to a fine, the Committee "observed that there was a pattern of conduct in Mr DP's disciplinary history" which justified an uplift in that fine, with the result that the sum of $4,000 was considered to be appropriate.[16]

[49] Mr DP was also ordered to pay costs of $2,500.

---

[11] At [43].
[12] At [44].
[13] At [60].
[14] At [61].
[15] At [65]f.
[16] At [62].

[50] Finally, to give effect to its various findings and orders, the following orders were made:

(a) Mr DP was ordered to reduce his total legal fees to $7,000 plus GST and disbursements, giving a total of $10,796.

(b) Mr DP was ordered to cancel his fees for the reconsideration application (with the exception of the filing fee).

(c) Mr DP was ordered to refund Mr RK any amount he had received in excess of $10,796, which the Committee calculated as being $1,630.

Fees certificate

[51] Attached to the Committee's determination was the required Certificate recording the Committee's conclusions about Mr DP's fees.[17]

[52] The Certificate comprised two tables. The first set out a list of the fees charged by Mr DP, related invoices together with GST and disbursements. That table revealed total legal fees of $15,000, GST of $2571.13, disbursements of $2,646, Office Services of $200; giving a gross amount of $20,096.

[53] The second table superimposed the Committee's conclusions about the individual fees charged. Disbursements were undisturbed, and Office Services were reduced to $100.

[54] In summary, the Certificate noted the Committee's finding that a fair and reasonable fee was $10,796. This figure included GST and disbursements.

[55] In round terms, the Committee reduced Mr DP's fees by a little over half.

Application for review

[56] Mr DP filed his review application on 21 December 2020. He has submitted:

(a) The Committee did not fully understand the issues involved with the pre-visa work, including the extent of that work.

(b) [School]'s costs were included in the quote Mr DP gave Mr RK for the pre-visa work, of $6,000 plus GST.

[17] Section 161(2) of the Act.

(c) The Committee wrongly assumed that Mr DP had charged Mr RK a total of $6,000 plus GST for legal fees.

(d) Legal fees for the pre-visa work were fair and reasonable.

(e) The fees agreement form was used by Mr DP, and adapted by him, to accommodate Mr RK's wish to have those arrangements in place, as well as the opportunity to pay fees by instalments. The fees agreement form was intended to reflect this.

(f) Mr DP had intended to cross out the words "upon approval" on the fees agreement form and instead write "upon result". He overlooked doing so. Nevertheless Mr RK clearly understood that legal fees were payable irrespective of outcome.

Response

[57] In an email to the Case Manager dated 27 January 2021, Ms FJ, on behalf of Mr RK, emphasised that Mr RK was clear that there was no discussion with Mr DP about fees being payable irrespective of outcome.

Nature and scope of review

[58] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[18]

> … 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.

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

[59] More recently, the High Court has described a review by this Office in the following way:[19]

> 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.

[60] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) Consider all of the available material afresh, including the Committee's decision; and

(b) Provide an independent opinion based on those materials.

Hearing in person

[61] Mr DP's application for review was progressed before me at a hearing in Auckland on 8 June 2021.

[62] Mr DP appeared in person, together with his employed solicitor Ms GH. Despite being invited to attend the hearing, Mr RK elected not to do so.

[63] Mr DP made oral submissions supporting his review application, and answered questions put to him by me. Ms GH also answered a number of questions put by me, in connection with her involvement with Mr RK's immigration matters.[20]

[64] I confirm that I have read Mr RK's complaint, Mr DP's responses to that and the Committee's determination. I have also read the review application and the response to that, and I have heard from Mr DP and Ms GH in person.

[65] There are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either of the parties.

---

[19] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[20] Ms GH did not begin to work for Mr DP until after Mr RK's pre-visa steps had been completed.

Discussion

Preliminary:

[School]

[66] In written submissions which accompanied his review application, Mr DP referred to having a "business association" with [School], and said that this was why he recommended the vocational service provider to Mr RK.[21]

[67] This information was not readily apparent from Mr DP's responses to Mr RK's complaint, when that complaint was being considered by the Committee.

[68] Consequently, the question of Mr DP's "business association" with [School] was not identified by the Committee as being a potential conduct issue.

[69] In connection with Mr RK's immigration matters, the reference by Mr DP to a "business association" with [School] raises a question of whether Mr DP was in breach of any of rr 5, 5.5 and 5.6 of the Rules.

[70] In summary, these rules are designed to ensure that a lawyer's other business or their personal interests do not compromise their fundamental requirement, set out in r 5 of the Rules, to be "free from compromising influences or loyalties when providing regulated services to [their] clients."

[71] Self-evidently, a lawyer should not steer a client towards a third party with which or whom the lawyer has a business or personal association, and encourage that client to engage that third party's services as part of the overall legal work to be carried out.

[72] Prompted by Mr DP's reference to a "business association" with [School], I raised the issue with him.

[73] It appears that Mr DP's description of a "business relationship" was significantly overstated.

[74] Mr DP explained that there had been a vocational service provider in New Zealand up until August 2018, offering the same qualification services as [School] (and several other vocational service providers in Australia). However, the New Zealand provider closed down, leaving immigration advisers and lawyers in this country to look elsewhere for that service on behalf of their clients.

[21] Mr DP's written submissions attached to his application for review (21 December 2020) at [13].

[75] Mr DP described contacting [School] and negotiating a reduction in their costs for clients he referred to it, intimating that this may be regular.

[76] [School] responded by advising Mr DP that it would reduce its costs from AUD$2,500 to AUD$1,800 for his clients.

[77] Mr DP was adamant that there was no advantage, benefit, payment or other reward to him for referring clients to [School]. He simply collected its AUD$1,800 costs from his clients at the same time as his own fees were paid by those clients, and passed that money on to [School].

[78] I questioned Mr DP closely about the arrangement he described. I concluded that despite Mr DP's description of a "business association" between his practice and [School], there was none such and that rr 5, 5.5 and 5.6 of the Rules did not appear to be engaged.

[79] Had I concluded that there was prima facie evidence of an arrangement in which Mr DP benefitted from referring his clients to [School], I would have next considered whether to refer that matter back to the Committee pursuant to s 209 of the Act, with a direction to investigate it in the light of rr 5, 5.5 and 5.6 of the Rules.

Invoicing

[80] However, Mr DP's [School] "association" raised a further issue of how he accounted to his clients for what is, in effect, a disbursement on top of his legal fees, when [School] is engaged on behalf of that client (the invoicing issue).

[81] The invoicing issue is a sub-set of one I deal with further below; specifically whether, across the all of the legal work carried out by Mr DP on Mr RK's behalf, Mr DP complied with his obligations under rr 1.6 and 3.4 of the Rules in relation to the provision of fees and other information to Mr RK.

[82] Mr DP explained that in giving – as he did in Mr RK's case – a global figure of $6,000 plus GST as a quote for the pre-visa work, he included [School]'s AUD$1,800 costs. As indicated above, Mr DP paid that money to [School] once he received it from his client. [School] issued Mr DP with an invoice for the amount.

[83] Mr DP said that he did not record [School]'s costs as a disbursement in his client invoices.

[84] Mr DP explained that this has been his invariable approach to cases such as Mr RK's.

[85] Mr DP did not describe this as a disbursement to his clients, and when quoting or estimating legal fees for pre-visa work, although he did appear to include as a disbursement in his pre-visa quote, the NZQA filing fee of $760. He also included disbursements (invariably the INZ filing or lodgement fees) when quoting or estimating fees for WRV or other visa work.

[86] As a preliminary observation, I consider that there is no difference between [School]'s costs on the one hand, and NZQA's or INZ's filing fees. All are disbursements on top of Mr DP's legal fees.

[87] Mr DP's practice of not separating out [School]'s costs as a disbursement means that, in practical terms, legal fees for the work he did for Mr RK as part of the pre-visa steps was, after deduction of [School]'s costs, considerably less than $6,000 (depending upon prevailing exchange rates).[22]

[88] There are two difficulties with this approach. First, [School]'s costs do not attract GST. Their invoices specifically describe their costs as being "GST free".[23] Yet, Mr DP included those costs in his $6,000 fees quote to Mr RK, and added GST to that figure ($900).

[89] This is plainly wrong. GST should not be charged on top of a disbursement said to be GST free.

[90] Secondly, in the invoices he was required to issue to Mr RK,[24] Mr DP should have identified which part related to his legal fees and which part related to disbursements – such as [School]'s costs (or whatever other disbursements might be incurred).[25]

[91] Because Mr DP appeared to have some difficulty accepting this at the hearing before me, I will set out below in some detail, the basis for saying that legal fees and disbursements must be separately identified when giving a quote, estimate or other indication of legal fees, and in any invoice.

---

[22] At the time to which these events relate (August 2018 and some months after that) the prevailing exchange rates apparently meant that AUD$1,800 was the equivalent of approximately NZD$2,200. I have adopted that for the purposes of this decision. It means that Mr DP's legal fees for the pre-visa work, were $3,800 plus GST and disbursements.
[23] [School] tax invoices to Mr DP (19 September 2018 and 8 January 2019).
[24] Regulation 9 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.
[25] Mr DP simply issued Mr RK with two invoices (dated 3 September 2018 and 20 February 2019, each for $3,000 plus GST of $450). He also issued a separate disbursement invoice on 7 December 2018 for $746, being NZQA's charges to assess and approve Mr RK's chef qualifications.

[92] First, a fee is what a lawyer charges their client for the legal services which the lawyer will provide for their client.[26] A disbursement is a third party cost incurred during the course of legal services being provided; an expense, if you like.[27]

[93] Secondly, r 3.4 of the Rules requires a lawyer to provide their client, in advance of beginning legal work on their behalf, with "[information in writing about] the basis on which the fees will be charged."

[94] There is nothing difficult about this. It clearly means that a lawyer must inform their client about how their legal fees will be calculated: by the hour (or some other measure), a quote or an estimate, or some conditional arrangement.

[95] I consider that this information is separate from information about any disbursements that may be incurred during the retainer.

[96] Given the principle of consumer protection underpinning the Act,[28] it is my view that a lawyer must also inform their client of likely disbursements – if known or reasonably contemplated – and where possible provide an indication of the amount of those disbursements.

[97] Support for this view can be gleaned from a number of sources.

[98] First, r 1.6 of the Rules provides:

> **Provision of information**
>
> All information that a lawyer is required to provide to a client under these rules must be provided in a manner that is clear and not misleading given the identity and capabilities of the client and the nature of the information.

[99] "Clear" and "not misleading" information about legal fees includes ensuring that those fees are not intermingled with disbursements.

[100] Secondly, r 9.6 which, although it deals with the obligation on a lawyer to provide their client with a final account within a reasonable time of concluding a retainer, requires the lawyer to "provide with the account sufficient information to identify the matter, the period to which it relates, and the work undertaken."

[101] In my view and as a matter of common sense, this contemplates an invoice which separates out fees for legal services from disbursements. Best practice would

---

[26] See r 9 of the Rules: "A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided …"
[27] Regulation 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 is headed "Fees and disbursements paid in advance of invoice."
[28] Section 3(1)(b).

reasonably suggest that this format should apply to each invoice issued to a client, and not simply a final invoice.

[102] Thirdly, as noted by me above at footnote 27, reg 10 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 deals with the trust accounting obligations imposed upon a lawyer when a client pays fees and disbursements in advance of an invoice being issued. That regulation clearly distinguishes between the lawyer's fees and any disbursements incurred during the retainer, and contemplates separate accounting for each.

[103] Fourthly, the New Zealand Law Society "Lawyers Trust Accounting Guidelines" provide the following:[29]

> 6.19 Where disbursements are included in an invoice or trust account statement to a client, the disbursements must reflect only actual payments by the practice to a third party and must not include any undisclosed fee charged by the practice. …
>
> It is difficult to record specific office overheads, such as telephone and tolls or photocopying, at cost to the practice. If a practice wishes to recoup some office overheads the recommended means of such recovery is to include an office service charge, recorded as a fee and not a disbursement. Such charges need to be disclosed and explained within the practice's client care information and cannot be included as a disbursement within the client invoice.

[104] Finally, the learned authors in *Ethics, Professional Responsibility and the Lawyer* had this to say on the topic of disbursements:[30]

> An underlying theme in the [Rules] is that a lawyer should profit only from his or her reasonable fee and not from collateral matters. …
>
> Clearly prohibited is the hiding of a premium on disbursements and thereby making a margin on those amounts. In *Canterbury Westland Standards Committee v P Currie* the Tribunal made it clear that such conduct was not permitted.
>
> [Citation omitted]

[105] I am not suggesting that Mr DP was engaging in the type of conduct that was before the Tribunal in the above case, which concerned invoicing clients for disbursements which had not been incurred. Nevertheless, the Tribunal made the point that it was essential for a lawyer to provide their client with accurate information regarding how fees will be charged.

---

[29] New Zealand Law Society *Lawyers Trust Accounting Guidelines* (November 2018).
[30] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [12.3].

[106] In light of all of the above, it presents as compelling to conclude that a lawyer must, when providing their client with clear and not misleading information about fees to be charged, separate out the legal fees for the services to be provided, from any third-party costs or disbursements that will or may be incurred.

[107] Any third-party costs or disbursements must be identified, where reasonably possible, in advance and information given as to their likely or actual costs.

[108] Further, disbursements must be separately itemised in the lawyer's invoice.

[109] It is not entirely clear to me why Mr DP adopted the practice of providing clients such as Mr RK, in relation to pre-visa work, with a global fees figure which included [School]'s costs, and failed to identify the disbursement in his invoicing. He appeared to suggest that it was because immigration clients, who tended to have English language difficulties, preferred to be given an "all-up" amount that they would have to pay.

[110] I would think that most clients, irrespective of their legal needs, prefer to be given some idea of what the total job is going to cost them. Immigration clients are unlikely to be any different from others in that regard.

[111] When giving that global figure (whether estimate, quote or merely general indication), I fail to see why Mr DP does not give a clear breakdown so that his client understands which component of the quote represents legal fees and GST, and which component represents disbursements.

[112] Quite apart from anything else, despite Mr DP securing a discounted arrangement with [School], his clients may prefer to engage some other vocational service provider and of course that would be their right.

[113] The real problem for Mr DP however is the way in which he accounts to his clients for the quote, estimate or general indication he gives for pre-visa work. That "accounting" is of course reflected in his invoicing, and that invoicing does not identify [School]'s costs as a disbursement.

[114] There appeared to me to be a degree of reluctance by Mr DP to accept the above position, although he did indicate that his invoicing practices would change to reflect the above. Because ultimately I will be confirming the Committee's order for Mr DP to undertake practice management advice, I would expect that advice to reinforce the matters I have outlined above.

Issues for determination by me

[115] The following are the issues for me to decide:

Pre-visa legal work

(a) What were the fee arrangements between Mr DP and Mr RK in relation to the pre-visa legal work?

(b) Did Mr DP comply with his obligations under rr 1.6 and 3.4 in relation to the provision of fees and other information to Mr RK?

(c) Were those fees fair and reasonable?

WRV application

(d) What were the fee arrangements between Mr DP and Mr RK in relation to the WRV legal work?

(e) Did Mr DP comply with his obligations under rr 1.6 and 3.4 in relation to the provision of fees and other information to Mr RK?

(f) Were those fees fair and reasonable?

Reconsideration application

(g) Did Mr RK instruct Mr DP to proceed with the reconsideration application and in doing so agree to pay additional legal fees of $3,000 plus GST and disbursements?

(h) Did Mr DP comply with his obligations under rr 1.6 and 3.4 in relation to the provision of fees and other information to Mr RK?

(i) Were those fees fair and reasonable?

Pre-visa work:

Fees arrangements

[116] There is no dispute that Mr DP gave Mr RK a quote of $6,000 plus GST and an NZQA disbursement of $746, to complete the pre-visa work.[31]

[31] As mentioned, there was an additional disbursement on top of the quote, of $746, being NZQA's charges for assessing and approving Mr RK's chef qualification.

[117] As I have outlined above, the legal fees component of the $6,000 plus GST quote, in fact amounted to $3,800 plus GST. This is because [School]'s costs (which I have fixed at NZD$2,200) were to be deducted from the $6,000 that Mr RK had agreed to pay.

[118] Further, there is no dispute that Mr DP agreed to Mr RK paying the total sum (fees, GST and NZQA disbursement) by instalments.[32]

Provision of information

[119] The fees agreement simply records the following in Mr DP's handwriting:

> Qualification = chef
>
> $6,000 + GST + $746.

[120] This information was unclear and misleading. It failed to identify that included in the figure of $6,000 were [School]'s costs. It also provided for GST to be paid on the sum of $6,000 in circumstances where [School]'s costs did not attract GST.

[121] I find that Mr DP breached rr 1.6 and 3.4(a) of the Rules by failing to provide Mr RK with clear information, that was not misleading, about the basis upon which legal fees would be charged in relation to the pre-visa work, and that this is unsatisfactory conduct pursuant to s 12(c) of the Act.

Fair and reasonable fees?

[122] Rule 9 of the Rules provides:

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

[123] The "reasonable fee factors" comprise a non-exhaustive list of factors to be taken into account by a lawyer when fixing the fee to charge their client. Thirteen factors are identified. Not all factors will apply to every case, and there may be others not listed which have application in some cases.

[124] Those factors from the list in r 9.1 which appear to have application in the present matter, include:

(a) The skill, specialised knowledge, and responsibility required to perform the necessary legal services properly.

---

[32] I deal further below with the total sum payable and paid by Mr RK to Mr DP across all of the legal work.

(b) The importance of the matter to Mr RK, and the results achieved.

(c) The urgency and circumstances in which the matter was undertaken, and any time limitations imposed.

(d) The complexity of the matter and the difficulty or novelty of the questions involved.

(e) Mr DP's experience, reputation and ability.

(f) The fixed fees/quotes provided, and the fees agreement.

(g) The fee customarily charged in the market and locality for similar legal services.

[125] Properly calculated and invoiced, the total amount payable by Mr RK for the pre-visa steps was as follows:

Legal fees: $3,800 + GST of $570	$4,370
[School] costs:	$2,200
NZQA charges	$ 746
	$7,316

[126] The question is whether legal fees of $3,800 were fair and reasonable.

[127] The Committee found the amount charged by Mr DP for the pre-visa work, was not fair and reasonable. Its conclusion was that a fair and reasonable fee was $1,000.

[128] This was based upon what the Committee considered to be the maximum amount of work required to ensure that Mr RK's chef qualification fell within the criteria for the LTSS category.

[129] Mr DP was critical of the Committee's reasoning and conclusion on this issue. He submitted that the Committee appeared to have only considered the work involved in submitting the chef qualification to the NZQA for assessment and approval.

[130] Mr DP argued that the Committee failed to consider the work involved in getting Mr RK's chef qualification to a standard whereby it could confidently be submitted to the NZQA for approval.

[131] In his written submissions in support of his review application, Mr DP said the following about the pre-visa work:

> [14] The list of services provided to [Mr RK] for his respective chef qualification are as follows:
>
> (i) An initial interview with Mr RK and assessing whether he has met the minimum requirement to apply for the [appropriate initial chef qualification] from [[School]];
>
> (ii) To help Mr RK prepare the relative documents to satisfy all requirements for each of the 33 units/modules in order to achieve [the relevant chef qualification]. This included drafting reference letters and or other evidential letters, collecting information, visiting site of his workplace to shoot photos, videos, providing advice on a step-by-step basis when preparing relative materials, clarifying questions for Mr RK to help answer the [chef qualification] kits etc. (The 33 units/modules are usually being taught at Commercial Cookery Schools for a duration of about 1 year for the students to achieve their respective level 4 qualification. Therefore, Mr RK had to prepare vast amount of detailed evidences to show that he knows or has sufficient skills and knowledge on each units/modules based on his past work experiences in order to attain the [chef qualification]);
>
> (iii) After receiving the [initial chef qualification], applying for the [final chef qualification] to have the overseas qualification recognised in New Zealand by NZQA;
>
> (iv) Liaising between [[School]] and NZQA on behalf of Mr RK via email and phone calls;
>
> (v) Providing any other admin assistance as needed in order to achieve Mr RK's [chef qualification] and NZQA assessment.
>
> [15] … Many hours were spent administering his qualification, inclusive of site visits at his restaurant to help them take photos and videos to demonstrate his culinary skills for his respective chef qualification assessment. We travelled from our office in [redacted]. We had spent around 80 hours, helping him prepare for the qualification.

[132] Mr DP pointed to the following passage from the Committee's determination to support his argument that the Committee too narrowly focussed its inquiry:

> [43] The Committee was particularly concerned with the $6000.00 fee that Mr DP charged for the NZQA assessment, and concluded that this was not commensurate with the work that was undertaken nor what would customarily be charged for similar services. The Committee noted that such assessments essentially are an administrative process, that is, the completion of a form outlining the applicant's overseas qualification and possibly including the relevant syllabus of that qualification. Costs for this application are often minimal and are frequently included in the costs of the main visa application. …

[133] This is the first reference in the Committee's determination to the legal work it was measuring against the quoted fee. It seems clear that the Committee was focused only on the process of submitting a form to NZQA and asking for Mr RK's chef qualification to be approved.

[134] It appears to me that the Committee has failed to consider the work undertaken by Mr DP before the "administrative process" it described. This, despite the fact that in his response to Mr RK's complaint, Mr DP specifically referred to the work involved in assisting Mr RK to obtain the necessary chef qualification for submission to and approval by, NZQA.[33]

[135] Further indication that the Committee appears to have limited its fees inquiry in connection with the pre-visa work, is found in the Certificate appended to the Committee's determination, as required by s 161(2) of the Act in cases of fees complaints.

[136] The certificate includes two tables: one outlining the fees charged by Mr RK, and a second superimposing the Committee's fair and reasonable fees conclusions.

[137] In connection with the pre-visa work, line one of the first table refers to "NZQA LTSS Chef Assessment – Initial" and allocates fees of $,3000 to that, and underneath that, line two records "NZQA LTSS Chef Assessment – Approve" with $3,000 in fees allocated to that.

[138] These two lines are clearly references to Mr RK's $6,000 plus GST quote for the pre-visa work.

[139] The second table, being the Committee's conclusions about fees, simply allocates $1,000 to "NZQA LTSS Chef Assessment – Initial", and nothing to the second line.

[140] In considering Mr RK's complaint, the Committee had the following to say:

> [36] In the present matter, the members of the Committee have significant expertise in immigration matters and complaints. The Committee was satisfied that it had the requisite experience to assess the reasonableness of the fees on this complaint.

[141] I do not for one moment doubt the skill, expertise and experience of the Committee in immigration matters.

[142] However, I consider that the Committee's analysis of the fees charged by Mr DP in relation to the pre-visa work was flawed, in two significant respects.

[143] First, the Committee proceeded on the basis that Mr DP's *legal fees* totalled $6,000 plus GST. No allowance was made for the fact that, properly analysed, the legal fees for the pre-visa work were in fact $3,800 plus GST.

---

[33] See for example Mr DP's letter to the Complaints Service (21 November 2019) at pp1–2.

[144] Some responsibility for that confusion must be sheeted home to Mr DP, because his invoices for this legal work did not identify [School]'s costs as a disbursement, although his submissions to the Committee did.

[145] I acknowledge of course that even if the Committee had proceeded from the position that legal fees were $3,800, it is likely that the result would have been the same: a fair and reasonable fee was $1,000.

[146] In my view the second area in which the Committee's analysis was flawed, was the way in which it framed and therefore determined the fees issue.

[147] It seems clear to me from the Committee's determination that it did not consider the full extent of the pre-visa legal work, and merely focussed on the "administrative process" of submitting the chef qualification to NZQA. As mentioned by me above, this is evident from the fact that the Committee expressed its "[concern] with the $6,000 fee that Mr DP charged for the NZQA assessment"[34] and described it as a form-filling exercise.

[148] It may well be that the Committee, in framing its concern in that way, was referring to all of the pre-visa work, including that which preceded submitting the chef qualification to the NZQA for assessment and approval.

[149] But there is considerable uncertainty about that in my mind, and I must give the benefit of that to Mr DP.

[150] Therefore, I agree with Mr DP's submission that the Committee appears to have focussed its attention on the last part of the pre-visa work (described as the "administrative process"), which was submitting the chef qualification to the NZQA for assessment and approval.

[151] This approach completely overlooks the work undertaken before that step could occur.

[152] Although Mr DP said that actual, recorded time for this work was in the region of 80 hours, which translates to two full working weeks and at his hourly rate of $350, a fee of $28,000, it could not be said that this represents a fair and reasonable fee or even a starting point for considering what would be a fair and reasonable fee.

[153] Mr DP readily accepted that.

---

[34] Standards Committee determination at [43].

[154] As well, merely saying that it took 80 hours does not lead to a conclusion that anything less is presumptively fair and reasonable.

[155] At the relevant time, Mr DP's charge out rate was $350 an hour, plus GST. I consider that to be a reasonable hourly rate having regard to Mr DP's experience in acting for clients in immigration matters.

[156] A fee of $3,800 represents almost 11 hours of Mr DP's time; or a little under one and a half working days.

[157] The Committee's assessment of a fair and reasonable fee of $1,000 plus GST for the administrative process of submitting the chef qualification to NZQA, represents an allowance by the Committee of some three hours of Mr DP's time.

[158] Adopting that measure, that leaves some eight hours of Mr DP's time to undertake the work necessary to assist Mr RK to obtain the chef qualification; i.e. work preparatory to the administrative process.

[159] I do not doubt that Mr DP undertook the work that he detailed in his written submissions. I accept Mr DP's submission that it was critical to the success of the WRV application that Mr RK should come within the LTSS category, and for that he needed a chef qualification.

[160] As matters stood when Mr RK instructed Mr DP, Mr DP correctly identified that Mr RK did not have the necessary chef qualification. He properly advised Mr RK of the steps necessary to obtain that, and assisted him with those steps.

[161] There seems no doubt that the course in which Mr RK enrolled at [School] was comprehensive, and required Mr RK to satisfy [School] with each module, that he had the necessary skills required, based on prior academic and practical experience, to pass that module. This explains, for example, time spent at Mr RK's workplace taking photographs.

[162] I am satisfied that the equivalent of 8 hours work by Mr DP, is a reasonable input for the preparatory work necessary before the administrative process could be completed.

[163] I therefore disagree with the Committee's conclusion about this issue of complaint, and I find Mr DP's fees of $3,800 plus GST and disbursements for the pre-visa work, to be fair and reasonable.

WRV legal work:

Fees arrangements and provision of information

[164] Again, Mr DP provided Mr RK with a quote for the WRV application, of $6,000 plus GST and any disbursements.[35]

[165] The Committee's view appears to have been that this was fair and reasonable, and it upheld that fee.

[166] This is apparent from the fact that in the body of its determination the Committee did not specifically address that fee, and in the statutory Certificate annexed to the determination the Committee included the WRV application fees in those it deemed fair and reasonable.

[167] There is a difficulty with this fee however, and it was identified by the Committee in its discussion about the fees agreement but otherwise taken no further.

[168] The difficulty is determining the basis upon which Mr RK was expected to pay Mr DP's legal fees for the WRV application. On that point, Messrs DP and RK are in opposite camps.

[169] In unravelling the matter, the first point to note is that Mr DP made handwritten additions to the fees agreement form, which in relation to the WRV application say the following:

> [WRV application] – Chef
>
> $6,000 + GST [+ disbursements].

[170] This is written near the top of the fees agreement form.

[171] Towards the foot of the fees agreement form, the following (relevant to this matter) is pre-printed (although Mr DP has handwritten the figures):

> **Option 2 [ticked]**
>
> …
>
> for each time. (3 times)
>
> **Legal Fees**
>
> Open file $3,000 [plus GST]
>
> …

[35] The disbursement was a filing fee payable to INZ for the WRV application, of $1,616.

> Upon Approval $3,000 [plus GST]
>
> …
>
> The initial fees are not refundable unless agreed in advance and the legal fees upon approval shall be paid only visa is approved.

[172] It seems to be the position that Option 2 applied to each of the three pieces of work that were anticipated when Mr RK instructed Mr DP: pre-visa work, a WRV application and finally a residence visa application.

[173] The "initial fees" appears to be a reference to "open file." Despite that, it is clear that the quote for legal fees for the WRV application, was intended to total $6,000 plus GST and disbursements. $3,000 of that was non-refundable.

[174] Both Mr DP and Mr RK have signed the bottom of the fees agreement form.

[175] Mr DP said that his usual practice with clients, once fees have been discussed and agreed, is to have his administrative staff prepare a "tailored fees agreement". I take this to mean that he does not use the fees agreement form.

[176] In Mr RK's case, Mr DP said that the initial meeting at which fees were discussed and agreed, lasted for one hour and that he (Mr DP) had another client meeting scheduled to begin immediately after Mr RK's. He said that there was no time left for him to arrange for the preparation of a tailored fees agreement, and so he resorted to the template fees agreement and made "tailored" notes on that.

[177] Mr DP said that Mr RK was anxious to have an agreement about legal fees and to be clear about what those fees were going to be.

[178] Mr DP acknowledged that on its face, the fees agreement form was not as clear as it needed to be. For example, he agreed that he should have used "Option 1" on the fees agreement form, which relates to quotes or fixed fee agreements with clients.

[179] Mr DP acknowledged that he had a quote/fixed fee arrangement with Mr RK, but because Mr RK wanted to pay his legal fees by instalments, and "Option 1" on the form made no allowance for that, he completed "Option 2" instead which is described as a "Contingency Fee Basis" and "1.5 – 2 times more expensive than option 1.."

[180] Mr DP said that "Option 2" did not properly describe the fees agreement he had with Mr RK, which he said was not a contingency fee. However, as indicated he resorted to "Option 2" and made margin notes on the fees agreement form to reflect a hybrid arrangement that amounted to a fixed fee or quote, but with the option to pay by instalments.

[181] Mr DP also said that his meeting notes clearly set out his understanding of the agreement reached with Mr RK about fees, and that he was equally clear that Mr RK understood what had been agreed.

[182] Specifically, Mr DP said that it was agreed and understood that legal fees for work towards the WRV ($6,000 plus GST and disbursements) and Residence from Work visa (also $6,000 plus GST and disbursements), would be payable by Mr RK irrespective of outcome.

[183] Quite clearly this differs from the provisions in the fees agreement form that I have set out above at [171]. Mr DP acknowledged this.

[184] Of course, Mr DP's meeting notes do not form part of the written fees agreement between himself and Mr RK. They were not shown to Mr RK, and he has not signed them. The four corners of the fees arrangements are represented by the fees agreement form and any agreed addition to or variation of that form (whether verbally or in writing).

[185] I will proceed on the basis that the quoted legal fees were made up of a non-refundable deposit of $3,000 and a balance payable of $3,000.

[186] In my view, the words "upon approval $3,000 [plus GST]" and "the initial fees are not refundable unless agreed … and the legal fees upon approval shall be paid only visa is approved" are capable only of one meaning: no visa, no balance payable.

[187] Mr DP agreed that this was the meaning of those words. He said that he had overlooked crossing them out and initialling that deletion when he and Mr RK signed the fees agreement form.

[188] Mr DP is adamant that Mr RK understood, at the end of their meeting and despite the provisions of the fees agreement form saying otherwise, that the $3,000 balance was payable irrespective of visa outcome.

[189] As against that, in both his complaint and response to the review application, Mr RK asserts his understanding about legal fees for the visa-related work (as opposed to the pre-visa work), was that the $3,000 balance was not payable if the WRV application was unsuccessful.

[190] This is a difficult issue to resolve, and as indicated above it is not an issue that the Committee considered; or, if it did, it concluded that the total of $6,000 plus GST for the WRV application, were nevertheless fair and reasonable.

[191] There is a clear difference between Mr DP's and Mr RK's understanding of those fees.

[192] This impasse would not have existed if Mr DP had adopted his usual practice of preparing a tailored fees agreement for Mr RK, as he said he did with other clients. I do not have great sympathy for his submission that he did not have time to arrange that because of a following meeting with another client.

[193] Mr DP should have made time to prepare a document which comprehensively and accurately recorded the agreement that he and Mr RK had reached about legal fees. Even a cursory glance of the fees agreement form that they signed should have alerted Mr DP to the fact that it was at odds with what he understood to be their oral agreement.

[194] Indeed, this need for clarity about fees is demanded by rr 1.6 and 3.4(a) of the Rules.

[195] Adapting a pre-printed form which makes no provision for fee payments by instalments, was replete with danger as Mr DP now concedes.

[196] It bears setting out what the Committee said about the fees agreement as a whole:

> 28. In the Committee's view, the explanation and the information provided by Mr DP was potentially misleading as it did not enable Mr RK to properly understand the proposed fee arrangement(s). Simply put, on review of the materials provided, it was not even clear to the Standards Committee how or on what basis the fees would be charged. As Mr DP's documentation was poor and confusing the Committee preferred Mr RK's account of how he understood the agreement. The Committee thought it was understandable that Mr RK was arguing that the fees charged were not consistent with [the fees agreement].
>
> 29. The Committee wishes to emphasise that [r 1.6 of the Rules] provides that the information *must be provided in a manner that is clear and not misleading*, taking into account the identity and capabilities of the client and the nature of the information. This suggests that the nature of the information and the client's perspective is important. In this case, the Committee itself (comprised of both lawyers and lay members) was left confused about the nature of the fee arrangement and what was being proposed.

[197] I respectfully agree with the Committee's observation that "it is not … clear how or on what basis the fees would be charged."

[198] In *Lawyers' Professional Responsibility* the learned author had this to say about terms in a contract of retainer between lawyer and client:[36]

---

[36] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [3.25].

> The retainer may include both express and implied terms. Usually, express terms are (or should be) documented in writing, in which case their meaning and scope is determined, like any other contract, on a process of construction. But unlike ordinary contracts between arm's length parties, an ambiguity in those terms will likely be construed *contra proferentem* (that is, strictly) against the lawyer, at least for the typical (inexperienced) lay client. As the lawyer drafts the retainer, it is reasoned, he or she should not benefit from an ambiguous expression. Such an approach aligns with both the incidents of fiduciary law imposed on lawyers in client dealings, and the law treating the lawyer–client relationship as one of influence.

[199] I am not at all convinced by Mr DP's submission that Mr RK was in no doubt about the terms of the agreement that they had reached about fees; specifically that the $3,000 balance was payable irrespective of outcome. My reasons include the following.

[200] First, at the hearing Mr DP said that English was not, in fact, his own first language and that from time to time he had difficulties either understanding English or making himself understood in English.

[201] Secondly, Mr DP said that Mr RK's level of English did not meet the required IELTS standard for inclusion in the Skilled Migrant Category as a pathway to residence. Mr DP said that he considered Mr RK's spoken English to be adequate, but not his reading level or his written English.

[202] Thirdly, Mr DP said that Mr RK's teenage daughter acted as a translator at the initial meeting at which fees were discussed and agreed. This hardly inspires confidence about a meeting of minds.

[203] Fourthly, once Mr RK had left the meeting with Mr DP, all he had by way of a record of what they had discussed about fees, was the fees agreement form which included "Upon Approval $3,000" and "no visa/no fee" sentence, some equivocal handwritten margin notes written above "Option 1" but pointing to "Option 2" and some deletions.

[204] Fifthly, Mr RK has been consistently adamant that he understood that he would not be required to pay the $3,000 balance if the WRV application was unsuccessful.

[205] The above combination of circumstances leaves me far from satisfied that Mr RK's understanding about legal fees was on all fours with Mr DP's: namely that the $3,000 balance was payable irrespective of visa outcome.

[206] What it means is that, because INZ declined to issue Mr RK with a WRV, in terms of the fees agreement Mr RK's visa was not "approved". The fees agreement clearly records that legal fees of $3,000 plus GST are payable "upon approval" and "only [if the] visa is approved."

[207] Strictly, this means that the fees agreement amounted to a conditional fee agreement as that is defined in s 333 of the Act. Indeed, "Option 2" of the form is so described. There are specific statutory and regulatory requirements attaching to conditional fee agreements (for example, see s 333 of the Act itself as well as r 9.8 (and following) of the Rules).

[208] However, I do not consider it necessary for me to embark upon a separate exercise as to whether or not Mr DP's fees agreement form breached those requirements and whether there are disciplinary consequences for Mr DP.

[209] This is because Mr DP's evidence was that he did not intend to enter into a conditional fee agreement with Mr RK. I accept that evidence. He said that he resorted to "Option 2" in haste to deal with an issue which, in his view, was not provided for on the fees agreement form: a fixed fee/quote in which fees may be paid by instalments.[37]

[210] The Committee found Mr RK's argument "understandable" that "the fees charged were not consistent with the agreement he signed on 31 August 2018", and that Mr DP "had failed to provide Mr RK with clear and adequate information [about] … the way that fees would be charged".[38] Nevertheless, the Committee concluded that the fees charged by Mr DP for the WRV application, were fair and reasonable.

[211] My conclusion is that the fees agreement form is inconsistent with Mr DP's evidence that there was a concurrent oral agreement whereby Mr RK agreed to pay the $3,000 plus GST balance, irrespective of outcome. The fees agreement form is consistent with Mr RK's understanding about legal fees for the WRV application (no visa, no balance payable).

[212] In the circumstances, the terms of the written fees agreement must prevail. Mr RK is not required to pay the balance payable of $3,000 plus GST. INZ declined his WRV application.

[213] Despite finding that the fees agreement form represents the four corners of the arrangements made about legal fees, the fact that this information was nevertheless confusing is evident from Mr DP's response to that issue of complaint.

[214] As described by me above, Mr DP maintained that there was a verbal agreement between himself and Mr RK which varied the written terms of the fees

[37] I might add that I do not agree with Mr DP's reservations about "Option 1" not allowing for fixed fees or quotes to be paid by instalments. But I need not embark upon that assessment.
[38] Standards Committee determination at [28] and [31].

agreement form by requiring payment of the $3,000 balance for the WRV application, irrespective of outcome.

[215] Having regard to my overall conclusions about the fees agreement form, I am satisfied that Mr DP failed to give Mr RK information about legal fees that was clear and not misleading, contrary to rr 1.6 and 3.4(a) of the Rules. This is unsatisfactory conduct by Mr DP, pursuant to s 12(c) of the Act.

Fair and reasonable fees?

[216] It follows from my conclusions immediately above, that it was neither fair nor reasonable for Mr DP to charge Mr RK, and expect him to pay, the $3,000 fee (the balance payable under the fees agreement) in circumstances where the fees agreement records that this was not payable if the WRV application was declined.

[217] This was a breach by Mr DP of r 9 of the Rules, and is unsatisfactory conduct pursuant to s 12(c) of the Act.

[218] Nevertheless, Mr DP received, or it was intended that he receive, $3,000 for the WRV application irrespective of outcome – albeit described on the fees agreement form as a fee for "open file."

[219] I must now consider whether this represents a fair and reasonable fee for Mr DP's legal work in connection with the WRV application.

[220] As I have observed, the Committee appears to have accepted that legal fees of $6,000 plus GST and disbursements, were fair and reasonable, as the second table in the Committee's Certificate, reflecting its findings about the fees charged, leaves the two figures of $3,000 for the WRV application, undisturbed.

[221] It may have been disingenuous for Mr DP to describe the non-refundable $3,000 plus GST as being to "open file". Quite clearly this amount was intended by him to be applied towards legal work associated with advice about and preparation of the WRV application.

[222] Looking at the legal work associated with the WRV application in the round, and having considered the material compiled by Mr DP and submitted to INZ as part of that, it is not difficult to imagine that considerable time would have been devoted to it. It could easily have consumed a full working day (eight hours), if not more than that.

[223] On a purely time-cost analysis, and assuming that the lion's share of the work was carried out by Mr DP, it seems to me that a fee of $3,000 plus GST and disbursements is readily capable of being described as fair and reasonable.

Reconsideration application:

Instructions and fees arrangements

[224] This issue is more straightforward.

[225] The reconsideration application was lodged in August 2019, in response to INZ declining Mr RK's WRV application.

[226] In very simple terms, the competing arguments are first, Mr RK's submission that he did not give Mr DP instructions to submit a reconsideration application and therefore did not agree to pay any legal fees for that step. On the other hand, Mr DP's submission was that these instructions were given by Mr RK, and agreement reached as to fees.

[227] Ms GH supported Mr DP's account. She was present at the meeting with Mr RK when advice was given that, because INZ had declined Mr RK's WRV application, the appropriate next step was to submit a reconsideration application to INZ.

[228] Ms GH said that Mr RK accepted that advice and gave explicit instructions to proceed. She said that Mr DP quoted a figure of $3,000 plus GST and disbursements ($320 INZ filing fee) for this legal work, and Mr RK agreed to pay those fees and disbursements.

[229] Corroborating his and Ms GH's evidence that Mr RK gave instructions to proceed with a reconsideration application, Mr DP produced several emails on that topic, which were exchanged between his office and Mr RK, beginning on 24 July 2019.

[230] A fair summary of the emails is that, first Mr RK was aware that a reconsideration application had been lodged on his behalf, secondly he did not object to this, and thirdly he was fully engaged in the process.[39]

[231] I am satisfied that the email exchanges show that Mr RK had instructed Mr DP to proceed with the reconsideration application.

[232] What is missing from the email exchanges, is any reference to legal fees.

---

[39] By way of example, in an email dated 5 August 2019 Mr RK said "thanks for informing me [that the reconsideration application had been submitted]".

[233] I think it highly unlikely that Mr DP would have agreed to undertake the legal work associated with submitting a reconsideration application, on the basis that he would not charge a fee.

[234] I am satisfied that Mr DP quoted, and Mr RK agreed to pay, legal fees of $3,000 plus GST and disbursements for the reconsideration application. The evidence of both Mr DP and Ms GH supports those conclusions.

Provision of information

[235] Mr DP acknowledged that he did not give Mr RK the required information in writing about the "principal aspects of client service [in connection with the reconsideration application] including … the basis on which the fees will be charged."

[236] Therefore, in undertaking this piece of legal work, Mr DP breached r 3.4(a) of the Rules in that he failed to provide Mr RK with "information [in writing] on the principal aspects of client service including … the basis on which the fees will be charged."

[237] I find this breach to be unsatisfactory conduct by Mr DP, pursuant to s 12(c) of the Act.

Fair and reasonable fees?

[238] The fact that Mr DP did not provide this information in writing does not mean that he cannot charge a fee. There is nothing in either the Act or the Rules which states that a breach of r 3.4(a) means that no fees can be charged for legal work which a client instructs their lawyer to undertake.

[239] In relation to this issue of complaint, the Committee found that the fees charged were not fair and reasonable on the basis that, first, the process was straightforward, and secondly "there was no written instructions or agreement whereby Mr RK was expressly advised of these fees or that he consented to them."[40]

[240] The Committee held:

> [56] … The Committee considered that it was likely that Mr RK instructed Mr DP to apply for reconsideration. …
>
> [57] However, the Committee wished to emphasise that it did have reservations about the processes followed on the reconsideration application. There was an absence of separate instructions to show that Mr RK was consulted.

[40] Standards Committee determination at [44].

[241] Although the above passages were from that part of the Committee's determination dealing with the issue of whether Mr DP failed to act competently, the comments have clearly informed the Committee's overall reasoning in relation to the legal fees for the reconsideration application.

[242] The Committee's comment at [57], that Mr RK did not appear to have been consulted about the reconsideration application, is at odds with the emails produced by Mr DP (and which were before the Committee), and which I have held clearly show that Mr RK was aware and approved of the reconsideration application.[41]

[243] Thus, the question becomes whether fees of $3,000 plus GST and disbursements for submitting the reconsideration application, were fair and reasonable.

[244] Mr DP explained, supported by Ms GH, that submitting a reconsideration application does not simply mean providing the same material with a request that it be reconsidered.

[245] Mr DP said that reconsideration applications are considered by a different INZ officer from the one who had declined the visa application. He said that, in practical terms, this means re-casting the WRV application itself, taking care to address issues which may have been a cause for concern or were the basis for the application being declined. This can sometimes involve extensive work.

[246] In Mr RK's case, the principal area of concern was the view taken by INZ that despite NZQA approving Mr RK's chef qualification, INZ did not consider that the qualification met its requirements. Mr DP's view was (and remains) that INZ's approach on that issue was untenable.

[247] Mr DP also submitted that he viewed other aspects of INZ's initial consideration of Mr RK's WRV application, as similarly flawed.

[248] Mr DP said that his usual fee for a reconsideration application was $6,000 plus GST and disbursements, but that he discounted this for Mr RK to $3,000 plus GST and disbursements.

[249] I accept Mr DP's description of the work involved in putting together the reconsideration application. In particular, I accept that the process involved much more than simply re-submitting the material that had already been provided on Mr RK's behalf, with little more.

---

[41] The Committee's comment at [57] does not appear to sit easily with its earlier comment at [56] that it was "likely that Mr RK instructed Mr DP to apply for reconsideration."

[250] I further accept that the process means adjusting earlier, unsuccessful, arguments and may include submitting additional material (which occurred here) together with relevant submissions.

[251] The reconsideration process involves inviting another INZ Officer to come to a different conclusion from their colleague. It would seem to me that compelling reasons and forceful advocacy and persuasion are required to accomplish this.

[252] In short, the process can be, and in Mr RK's case was, considerably more than the administrative exercise described by the Committee.

[253] The work was largely shared between Mr DP and Ms GH (whose charge out rate at the time was $250 an hour plus GST). Because a quote was given, time records were not kept.

[254] Adopting a purely arbitrary approach of allocating approximately four hours of work to Mr DP, and six hours of work to Ms GH, at their respective hourly rates this produces a fee of very nearly $3,000 plus GST.

[255] I have adopted a time-based approach to give some context to the quoted fee. It represents a little over one day's legal work.

[256] In all of the circumstances, I am satisfied that Mr DP's fees for the reconsideration application, were fair and reasonable.

Conclusion

[257] I have made the following findings:

(a) In relation to the pre-visa work, Mr DP failed to provide Mr RK with information in writing, that was clear and not misleading, in relation to the basis upon which fees would be charged for that legal work. This is a breach of rr 1.6 and 3.4(a) of the Rules and is unsatisfactory conduct pursuant to s 12(c) of the Act.

(b) Mr DP's legal fees for the pre-visa work, of $3,800 plus GST and disbursements (totalling $7,316), were fair and reasonable. This reverses the Standards Committee's findings about this issue.

(c) In relation to the WRV application, Mr DP failed to provide Mr RK with information in writing, that was clear and not misleading, in relation to the basis upon which fees would be charged for that legal work. This is a

breach of rr 1.6 and 3.4(a) of the Rules and is unsatisfactory conduct pursuant to s 12(c) of the Act.

(d) Mr RK is not required to pay Mr DP the balance payable under the fees agreement of $3,000 plus GST for the WRV application.

(e) Mr DP's insistence that Mr RK pay the balance payable of $3,000 under the fees agreement form, in circumstances where Mr RK was not contractually obliged to do so, means that Mr DP charged a fee that was neither fair nor reasonable. This is a breach of r 9 of the Rules and is unsatisfactory conduct pursuant to s 12(c) of the Act.

(f) Mr DP's legal fees for the WRV application, of $3,000 plus GST and disbursements (totalling $5,066), were fair and reasonable. This modifies the Standards Committee's findings about this issue.

(g) Mr RK instructed Mr DP to submit a reconsideration application to INZ following the WRV application being declined by it, and agreed to pay legal fees of $3,000 plus GST and disbursements (totalling $3,870).

(h) In relation to the reconsideration application, Mr DP failed to provide Mr RK with information in writing in relation to the principal aspects of client service including the basis upon which fees would be charged for that legal work. This is a breach of r 3.4(a) of the Rules and is unsatisfactory conduct pursuant to s 12(c) of the Act.

(i) Mr DP's legal fees for the reconsideration application were fair and reasonable. This reverses the Standards Committee's findings about this issue.

[258] In total, I have found that Mr DP's legal fees of $9,800 plus GST (totalling $11,270) and disbursements (totalling $4,882)[42], in relation to the pre-visa work, WRV application and the reconsideration application, were fair and reasonable. The grand total of fees, GST and disbursements is $16,152.

[259] It is not disputed that the total amount paid by Mr RK to Mr DP, was $12,426. This was applied in the first instance to disbursements.

[260] This leaves a shortfall of fees and GST owing by Mr RK to Mr DP, of $3,726.

[42] The disbursements were: $2,200 [School] costs; $746 NZQA filing fee; $1,616 INZ WRV application filing fee and $320 INZ reconsideration application filing fee.

[261] This reverses the Committee's order that Mr DP is to refund monies received by him over the amount of $10,796, which is the amount determined by the Committee to have been a fair and reasonable fee.

[262] I also note that in finding that Mr DP had failed to provide Mr RK with adequate information, the Committee determined that this was unsatisfactory conduct pursuant to both ss 12(a) and (c) of the Act.[43]

[263] Whilst either provision would have application to Mr DP's breaches of rr 1.6 and 3.4(a), in my view a finding under s 12(c) sufficiently marks Mr DP's unsatisfactory conduct.

[264] Similarly, the finding that Mr DP had charged a fee that was neither fair nor reasonable, was held by the Committee to be unsatisfactory conduct under all of ss 12(a), (b) and (c) of the Act.[44]

[265] Again, I conclude that a finding under s 12(c) of the Act sufficiently marks Mr DP's conduct in charging a fee that was not fair and reasonable, in relation to the WRV application.

Penalties and orders:

Practice management advice

[266] Mr DP acknowledged during the hearing that he would benefit from advice on aspects of his practice management systems. Having heard from Mr DP, I consider that those aspects include his fees agreement, the provision of information to his clients in accordance with r 3.4 of the Rules, the proper accounting of disbursements and proper invoicing practices.

[267] I therefore confirm the Committee's order, and its terms, in relation to the question of practice management advice. In particular, I confirm that Mr DP is to initiate contact with Ms TQ, within 15 working days of the date of this decision. Further, Ms TQ is to provide a report to the Complaints Service at the completion of her engagement by Mr DP, summarising any outcomes.[45]

---

[43] Section 12(a) defines unsatisfactory conduct as "conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer."

[44] Section 12(b) defines unsatisfactory conduct as "conduct that would be regarded by lawyers of good standing as being unacceptable, including … conduct unbecoming a lawyer … or … unprofessional conduct."

[45] I direct that pursuant to s 206(5) of the Act, a copy of my decision is to be given to Ms TQ by Mr DP. I make this limited publication order on the grounds that it is in the public interest for Mr DP to obtain practice management advice.

Fine

[268] The Committee imposed a fine of $4,000, having arrived at that figure following an uplift from a lesser, unspecified amount. The Committee's rationale for the uplift concerned Mr DP's disciplinary history, which apparently involves similar issues to those raised by Mr RK's complaint.

[269] Mr DP's disciplinary history is not before me, as it obviously was for the Committee. I cannot comment on any similarities, differences or patterns between that disciplinary history and the present matters, but I accept what the Committee has said about those issues.

[270] The Committee's disciplinary finding is related to the adequacy and accuracy of the information provided to Mr RK, and to the finding that Mr DP charged fees that were neither fair nor reasonable in relation to the pre-visa work, and the reconsideration application.

[271] I have upheld the Committee's findings about the adequacy and accuracy of information provided, and have also added my own concerns about that.

[272] However, I have disagreed with the Committee's conclusions about the fees charged for the pre-visa work and the reconsideration application. Conversely, whereas the Committee appeared to find the total fees charged for the WRV application were fair and reasonable, I have found that Mr DP is only entitled to charge a fee for that work of $3,000 plus GST and disbursements.

[273] I regard Mr DP's conduct in relation to the fees agreement form, and his explanation for the inconsistencies between it and his understanding of what was agreed, as serious. Mr DP hurried through the process of discussing and agreeing fees with Mr RK, because he had another client waiting to see him.

[274] There is simply no excuse for hurrying that process, particularly where for both parties English was a second language.

[275] As a result, lawyer and client had diametrically opposite views about fees and expectations in regard thereto.

[276] There is also no excuse for Mr DP's failure to provide written fees information to Mr RK in relation to the reconsideration application. He could easily have done so. The result was yet another disagreement between the two about fees expectations, although I have found in Mr DP's favour on that issue.

[277] The requirement to provide clear and not misleading information about the basis upon which fees will be charged, is a clear illustration of the consumer protection principles which underpin the Act.

[278] Those principles are predicated upon the obvious power imbalance between lawyer and client: a lawyer has specialist qualifications and knowledge, and invariably experience as well. A client, on the other hand, is emotionally invested in the matter they have taken to the lawyer and requires advice on all aspects of that relationship.

[279] Mr DP's fees agreement form was, frankly, a mess. It was inappropriate of him to seek to introduce his file note as evidence of the actual fees agreement. As I observed earlier in this decision, Mr RK did not sign, much less did he see or have a copy of, that file note.

[280] The maximum fine that can be imposed, is $15,000. It is generally considered that a starting point for a fine, is $1,000. A fine in that amount would generally be imposed for relatively minor or technical rules breaches.

[281] Despite the differences between outcomes as between the Committee's determination and this decision, in particular in connection with fees, I consider that a fine of $3,500 properly meets the seriousness of the matters I have identified, discussed and made findings about.

[282] For the avoidance of doubt, I record that I have not taken into account Mr DP's previous disciplinary history, to which the Committee referred and said it factored into the assessment of the fine imposed. I do not have the information before me about that history, that was apparently before the Committee.

[283] It is for that reason that the fine I have imposed, is less than that imposed by the Committee.

Committee's costs

[284] Given that I have upheld aspects of the Committee's determination, it is appropriate that the costs order made by it, stands.

Decision

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

(a) Confirmed as to the finding that Mr DP failed to provide clear and not misleading information to Mr RK, about fees and other aspects of his services, contrary to rr 1.6 and 3.4(a) of the Rules.

(b) Reversed as to the finding that the fees charged by Mr DP for the pre-visa work were not fair or reasonable.

(c) Reversed as to the finding that the fees charged by Mr DP for the WRV application were fair and reasonable and replaced with a finding that of the $6,000 fee charged, $3,000 of that amount is neither fair nor reasonable.

(d) Reversed as to the finding that the fees charged by Mr DP for the reconsideration application were not fair or reasonable.

(e) Confirmed as to the requirement for Mr DP to undertake practice management advice.

(f) Modified as to the imposition of a fine of $4,000, and instead a fine of $3,500 is imposed.

(g) Confirmed as to the requirement for Mr DP to pay the Committee's costs of $2,500.

Costs on review

[286] When a finding of unsatisfactory conduct is made or upheld against a practitioner, costs will be awarded in accordance with the Costs Orders Guidelines of this Office.

[287] It follows that Mr DP is ordered to pay costs in the sum of $1,200 to the New Zealand Law Society by 5pm on Friday 16 July 2021, pursuant to s 210(1) of the Act.

Enforcement of money orders

[288] Pursuant to s 215 of the Act, I confirm that the money orders made by me in [284] and [285] above, may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[289] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 25TH day of JUNE 2021

_____

R Hesketh
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 DP as the Applicant
Ms FJ on behalf of Mr RK as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society