LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 134

Ref: LCRO 27/2021

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	**BK** Applicant
AND	**RQ** Respondent

DECISION

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

Introduction

[1] Ms BK has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of the respondent, Ms RQ.

Background

[2] Ms BK's mother, CK, passed away on 6 April 2018.

[3] Mr HM was appointed the sole executor for CK's estate.

[4] In his capacity as executor, Mr HM instructed Ms RQ to act as solicitor for the estate.

The complaint and the Standards Committee decision

[5] Ms BK and Ms WT lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 25 September 2019.

[6] Their complaint when first articulated, raised a number of concerns regarding the manner in which Mr HM had carried out his duties as executor, but also expressed concerns regarding the service that had been provided by Ms RQ.

[7] To the extent that the initial complaint identified conduct issues engaging Ms RQ, the substance of the complaint was that Ms RQ had:

(a) failed to provide a schedule of fees when requested to do so; and

(b) had attended meetings with some of the beneficiaries but not others; and

(c) had charged the estate for work completed after she had terminated her retainer; and

(d) charged fees that were unreasonable.

[8] The Complaints Service initially identified the elements of complaint as being:

(a) whether Ms RQ had charged more than a fee that was fair and reasonable; and

(b) whether Ms RQ had acted competently and in a timely manner in relation to the administration of the estate.

[9] On 15 November 2019, Ms BK wrote to the Complaints Service. In this correspondence she identified further complaints against Ms RQ, being complaint that Ms RQ had:

(a) drafted a deed that had threatened to withhold distribution of funds if the beneficiaries refused to sign; and

(b) undertaken private work for some of the beneficiaries without the knowledge or consent of the other beneficiaries; and

(c) performed menial tasks for the estate which should have been completed by the executor or family members; and

(d) refused to respond to requests to provide information.

[10] Ms RQ, through her counsel, responded to the complaint on 17 December 2019.

[11] It was submitted that Ms RQ:

(a) was at all times acting under instruction from Mr HM in his capacity as executor; and

(b) had been engaged by Mr HM on two separate occasions, those instructions recorded in a letter of engagement; and

(c) her charge out rate was well within normal industry standards; and

(d) the estate was administered in a timely manner;

(e) the complaint appeared to be focused on the actions of the executor.

[12] In providing a response to Ms RQ's submission on 30 January 2020, Ms BK identified two issues as being at the heart of her complaint against Ms RQ, being:

(a) whether Ms RQ had charged the estate more than a fee that was fair and reasonable for the services provided; and

(b) whether Ms RQ had acted competently and in a timely manner in relation to the administration of the estate.

[13] The Standards Committee tasked with completing investigation into the complaints, issued a notice of hearing on 23 April 2020 in which it identified the focus of its conduct investigation as being:

(a) whether fees charged were fair and reasonable; and

(b) whether Ms RQ acted competently and in a timely manner in relation to the administration of the estate; and

(c) whether Ms RQ responded to requests for information from the beneficiaries in a timely manner; and

(d) whether Ms RQ maintained proper standards of professionalism in her conduct as solicitor for the estate.

[14] In providing response to the issues identified by the Committee in the notice of hearing, Ms BK reiterated the concerns she had raised concerning the service that Ms RQ had provided.

[15] Counsel for Ms RQ provided a comprehensive response to the Committee's notice of hearing. It was submitted for Ms RQ that:

(a) no complaint had been made concerning Ms RQ's fee by the executor of the estate; and

(b) the terms of engagement provided by Ms RQ, stated the basis on which fees would be charged; and

(c) the extent of the work done by Ms RQ could not be in dispute as the work completed was extensive; and

(d) invoices provided were comprehensive and detailed the extent of the work completed; and

(e) fees charged were fair and reasonable; and

(f) Ms RQ had acted in a timely and competent manner; and

(g) it was within the ambit of Ms RQ's instructions, and consistent with tasks an estate lawyer is required to address, that Ms RQ attend to matters that the complainants considered should have been managed by the executor or family members; and

(h) Ms RQ was not responsible for the contents of the deed drafted which some of the beneficiaries had raised objection to, but in any event it was good practice to include an indemnity clause to protect the executor; and

(i) it was incorrect to suggest that Ms RQ had advised the beneficiaries that a distribution would not be made if the beneficiaries failed to sign the deed, rather her instructions were that the deed would need to be signed promptly if she was to be able to arrange distribution prior to the Christmas break; and

(j) Ms BK's objections were not supported by all the beneficiaries; and

(k) Ms RQ had properly charged for time spent reading emails that had been forwarded to her by beneficiaries; and

(l) Ms RQ had responded to inquiries from the beneficiaries promptly and in an informative and transparent manner; and

(m) Ms RQ's second terms of engagement specifically provided that she would not be required to deal with the beneficiaries; and

(n) Ms RQ had not been involved in the decision to engage other parties; and

(o) the complainants were the only two of the five beneficiaries who had expressed dissatisfaction with the manner in which Ms RQ had managed the estate.

[16] Armed with the comprehensive submissions received from the parties, the Standards Committee concluded that it would be appropriate to appoint a costs assessor.

[17] Mr AJ was instructed to prepare that costs assessment and delivered his report to the Committee on 17 September 2020.

[18] Mr AJ concluded that the fee charged was high for the work involved.

[19] He considered a fee of $11,810 (exclusive of GST and disbursements) to be fair and reasonable for the work involved.

[20] At the nub of Mr AJ's report, was his view that the work completed by Ms RQ was for the most part relatively straightforward and conventional (gathering assets, paying liabilities, and preparing for distribution) and that much of the work could have been adequately managed by a legal executive at a charge out rate of $250 per hour, as opposed to the $350 charged by Ms RQ.

[21] The complainants and Ms RQ provided comments on the cost assessor's report.

[22] The Standards Committee delivered its decision on 21 January 2021.

[23] The Committee determined, pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[24] In reaching that decision the Committee concluded that:

(a) Ms RQ's hourly rate was not exceptional for a practitioner of Ms RQ's experience; and

(b) it did not agree with the costs assessor that all of the attendances could have been completed by a legal executive; and

(c) while some of the attendances could have been charged at the rate of a legal executive, there were elements of the retainer that justified the higher rate; and

(d) it did not consider that the fees charged stood out as excessive for the services provided; and

(e) fees charged were within the range that would be customarily charged in the market and locality for similar services; and

(f) there was no evidence that Ms RQ had continued to act for the estate after the retainer had concluded; and

(g) Ms RQ's primary obligation was to the executor; obligations she owed to the beneficiaries were extremely limited; and

(h) there was no evidence to suggest that Ms RQ had failed to act in a competent and timely manner; and

(i) Mr HM had primary responsibility for reporting to the beneficiaries; and

(j) request of beneficiaries to sign a deed of interim distribution was not uncommon in circumstances where distribution within six months of probate was being proposed.

Application for review

[25] Ms BK filed an application for review on 2 March 2021.

[26] In significant part, Ms BK's application reiterates the concerns she had raised in advancing her initial complaint.

[27] To the extent that her application traverses new material or identifies concerns with the Committee's decision, Ms BK submits that:

(a) Ms RQ's relationship with Mr HM was not independent or at arm's length; and

(b) Mr HM had been nonchalant in providing oversight of Ms RQ's accounts; and

(c) the Committee had been hampered by Ms RQ's failure to maintain time records; and

(d) as Ms RQ had claimed that she was not responsible for the deed that she prepared, it was unreasonable for the Committee to cite this work as an example of more complex work that had been completed; and

(e) no other examples of higher-level work had been provided; and

(f) the Committee erred in concluding that assessment of a reasonable fee involved a balancing exercise; and

(g) the work involved was not complex; and

(h) disagreement between the beneficiaries was caused by the failure of Mr HM and Ms RQ to provide adequate information; and

(i) there had been a degree of "double dipping" in the fees charged by Mr HM and Ms RQ; and

(j) Ms RQ should have informed the beneficiaries when she was reinstructed by Mr HM to carry out further work; and

(k) the terms of Ms RQ's retainer were never made clear to the beneficiaries; and

(l) perusing correspondence from a beneficiary should not have incurred charges to the estate; and

(m) work incurred in drafting the deed of interim distribution was unnecessary.

[28] In summarising her view of Ms RQ's management of the estate, Ms BK contended that Ms RQ had:

> … Shamelessly taken advantage of her close relationship with Mr HM, her position as a lawyer and her ability to communicate with the beneficiaries to charge as much money from this basic estate, as well as fuel distrust and confusion amongst the beneficiaries, and attempt to slander the relationship between the beneficiaries as her justification to providing these unwanted and unneeded Legal Services when her sole motivation has been easy money.

[29] By way of outcome, Ms BK seeks a reversal of the Committee's decision.

[30] Ms RQ was invited to comment on Ms BK's review application.

[31] Counsel for Ms RQ submitted that:

(a) the approach by the Committee in adopting a holistic approach to determining whether fees charged were fair and reasonable was appropriate; and

(b) whilst Ms RQ was responsible for drafting and actioning the deed, that work was done acting on the instructions of Mr HM; and

(c) there were numerous instances of complex work undertaken; and

(d) it is inappropriate to attempt a line by line analysis of every item of work done then attempt to designate the level of expertise required to complete the work; and

(e) there was no evidence to suggest a duplication of work between Mr HM and Ms RQ; and

(f) inclusion of the indemnity clause in the deed was a decision made by Mr HM, but in any event inclusion of an indemnity was entirely reasonable when distribution was proposed to be made within six months of the grant of probate; and

(g) it was Mr HM's responsibility to communicate with the beneficiaries, particularly after 21 January 2018, when new terms of engagement were entered into; and

(h) Ms RQ was responsibly doing her job in reading emails that had been forwarded to her; and

(i) difficulties with remediation of the apartment, had significant consequence in contributing to delay.

[32] In concluding her submission, counsel for Ms RQ submits that there was nothing in the application filed by Ms BK which could provide reason for the Legal Complaints Review Officer (LCRO) to depart from or amend the determination of the Standards Committee.

Review on the papers

[33] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a LCRO to conduct the review on the basis of all information

available if the LCRO considers that the review can be adequately determined in the absence of the parties.

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

Nature and scope of review

[35] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[1]

> … 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.

[36] More recently, the High Court has described a review by this Office in the following way:[2]

> 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.

[37] 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:

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

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

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

Discussion

[38] The issues to be addressed on review are:

(a) Did Ms RQ maintain proper standards of professionalism in her conduct as solicitor for the estate?

(b) Did Ms RQ act competently and in a timely manner in relation to the administration of the estate?

(c) Did Ms RQ respond to requests for information from the beneficiaries in a timely manner?

(d) Were the fees charged by Ms RQ fair and reasonable for the services provided?

Analysis

Did Ms RQ maintain proper standards of professionalism in her conduct as solicitor for the estate?

[39] A number of concerns raised by the complainants can be corralled under the umbrella of general criticism that Ms RQ had failed to manage the estate in a professional manner.

[40] Included in this raft of complaints was concern that Ms RQ had not been sufficiently distanced from Mr HM, that she had failed to communicate effectively with the beneficiaries, that she had been lax in responding to inquiries, that she had undertaken work that was unnecessary, and that her failure to efficiently manage the administration of a relatively modest estate, had contributed to unnecessary delay and an escalation in costs.

[41] A number of submissions were filed by the complainants in advancing their complaint. By the time the matter arrived at the door of the Review Officer, complaint that Ms RQ's former professional relationship with Mr HM had compromised Ms RQ had elevated to the level where Ms RQ stood accused of shamelessly exploiting her relationship with Mr HM so as to allow her opportunity to milk funds from the estate.

This serious allegation was accompanied by accusation that she had attempted to undermine the relationship between the beneficiaries to provide justification for carrying out legal work that was neither requested or required.

[42] The starting point for consideration of such serious criticisms, is an examination of the relationship between Ms RQ and the beneficiaries.

[43] Understandably, and as is often the case in situations such as these, the complainant beneficiaries advance their criticisms of Ms RQ from the perspective that they (as the ultimate recipients of the assets of their late mother's estate) were in essence Ms RQ's clients, and she was, at all material times, responsible to them for actions taken in administering their late mother's estate.

[44] In advancing argument that was underpinned with inference that Ms RQ was directly accountable to the beneficiaries, the complainants misunderstand the nature and scope of Ms RQ's obligations.

[45] Second only to the duty a lawyer owes to the court as an officer of the court, are the duties a lawyer owes to their client.

[46] Mr HM was Ms RQ's client. As the executor of the estate, it was Mr HM who instructed Ms RQ, and it was to Mr HM, that Ms RQ was directly accountable.

[47] Mr HM's role as executor, and Ms RQ's role as solicitor for the estate, were quite distinct.[3]

[48] It is the executors who are responsible to the Court (where administration is granted) and to the beneficiaries for the proper implementation of the will. Decisions affecting the course of administration are made by the executors in that capacity, although the solicitor or some other professional might be called upon to implement the decision.

[49] The solicitor's obligations are much more limited. The solicitor is responsible to the executors, from whom the solicitor's instruction stems and who are the solicitor's clients.

[50] However, the fact that Ms RQ was not acting in the capacity as solicitor for this estate under the instructions of Mr HM, does not preclude a finding of a breach of professional standards. As beneficiaries of the estate and parties directly affected by the fees charged by Ms RQ, the complainants were entitled to complain about fees

[3] A helpful examination of the role of the executor / trustees/and solicitor for an estate is found in *Hansen v Young* [2004] 1 NZLR 37 (CA).

charged to the estate.[4] But the extent to which they have standing to pursue complaint regarding the broader aspects of Ms RQ's management of estate matters, is limited.

[51] Complaints regarding lack of communication, criticisms of work completed, dissatisfaction with procedural steps taken such as the decision to execute a deed of release and indemnity, are complaints that are properly directed to the executor.

[52] Ms RQ had a responsibility to maintain proper standards of professionalism in her dealings, and to conduct her dealings with others with courtesy and respect.[5]

[53] In a decision of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal which directly addressed the scope of the obligations a solicitor acting on the administration of an estate owed to beneficiaries, the Tribunal noted that strictly speaking a solicitor acting on instructions from an executor had no obligation to report to the beneficiaries, but observed that it would be accepted practice for beneficiaries to be extended a degree of courtesy, and for them to be kept advised of progress in collecting and realising the assets in which they had an interest.[6]

[54] Whilst the complainants are critical of what they perceived to be a failure on Ms RQ's part to keep them properly informed, it was Mr HM who was primarily responsible for reporting to the beneficiaries. I have carefully considered the extensive correspondence on the Standards Committee file and having done so, I see no evidence of Ms RQ of having failed to ensure that her engagement with the beneficiaries was conducted in a courteous manner.

[55] Certainly, there is no evidence provided to support serious allegation that Ms RQ and Mr HM were enmeshed in an unhealthy alliance which provided fertile environment for Ms RQ to unscrupulously exploit the estate assets while Mr HM turned a blind eye.

[56] It is regrettable that the complaints as elaborated on review, were elevated to a level of seriousness that had not been reflected in the articulation of the complaints when first advanced.

[57] Whilst complaints are made regarding the manner in which Ms RQ managed the estate and criticism is made of alleged failings to communicate effectively, my sense is that the beating heart of the complaint is concern that fees charged were excessive.

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[4] Section 160(1) of the Act.
[5] Rules 10 and 12 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[6] *Re Johnston* [2011] NZLCDT 14 at [23].

[58] It is noted that Mr HM made no complaint about Ms RQ's conduct and it appears to be the case that progressing the administration of the estate was hampered to a degree by problems with remediation of an apartment, and a degree of dissent amongst the beneficiaries.

[59] On review, Ms BK suggests that disagreements between the beneficiaries had been primarily caused by Ms RQ and Mr HM failing to provide information. She provides no evidence from other beneficiaries to support contention that disharmony amongst the beneficiaries had been created by Ms RQ's failure to keep the beneficiaries adequately informed. The only evidence on the file from the beneficiaries who had not elected to join the complainants in raising concerns about Ms RQ, is email correspondence from a beneficiary expressing support for the work that had been done by Ms RQ on the estate matters. In that correspondence, the beneficiary had expressed concern at the criticisms that had been made by their fellow beneficiaries.

[60] Considerable emphasis is placed by the complainants on argument that they were inappropriately pressured by Ms RQ into executing a deed of release and indemnity.

[61] They considered the request to execute the deed both unnecessary and reflective of the general mismanagement of the estate. The complainants provided a copy of correspondence from a lawyer instructed by them (Mr EL),[7] in which Mr EL had expressed in forthright terms, his concerns about aspects of the management of the estate.

[62] In that correspondence, Mr EL advised that the issue he particularly wished to address was the request made of the beneficiaries to execute the deed for interim distribution and indemnity.

[63] Mr EL advised that he was "astonished at both the fact of the deed and its terms which seek the agreement of the beneficiaries to a wide-ranging indemnity to the executor".[8]

[64] Mr EL considered that there was "absolutely no requirement for beneficiaries to have superimposed on them further rights of the executor in return for the executor simply doing his job".[9]

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[7] EL, correspondence to [law firm] (12 December 2018).
[8] At [2].
[9] At [4].

[65] Counsel for Ms RQ considered that there was nothing untoward or unconventional in making request of the beneficiaries to execute the deed and submitted that "the inclusion of an indemnity is entirely reasonable if a distribution is to be made within six months of the grant of probate".[10]

[66] It does not fall to the LCRO to make definitive findings on contested views as to practice commonly adopted in this aspect of estate management, but I consider it significant that a Committee comprised of experienced practitioners (including members experienced in estate administration) considered that it was not unusual for a deed of interim distribution containing an indemnity to be prepared in circumstances such as those confronting Mr HM and Ms RQ.

[67] Support for the Committee's view is found in *KB v JR* LCRO 246/2012, where the Review Officer found himself in agreement with a Standards Committee, that the decision as to whether or not to request a deed of final release and indemnity is a judgement call for a practitioner to make with reference to the circumstances of a particular retainer and is indeed common practice among some solicitors.

[68] I do not, as did the Review Officer in *KB v JR*, consider that execution of the deed could be insisted on as a pre-condition to distribution, but importantly, Ms RQ drafted the deed on the instructions of her executor client.

[69] Commonly, beneficiaries are cooperative and agree that administration of an estate has been properly carried out and in those circumstances have no objection to executing such a deed. If they do have objections, then the matter is raised and addressed as part of the administration of the estate.

[70] Criticism is made of Ms RQ that she cited as evidence of more difficult work that had been done, the work involved in drafting the deed, but had then attempted to step back from assuming responsibility for the work done by shifting responsibility to Mr HM.

[71] This criticism is unmerited.

[72] Mr HM, in an attempt to protect his position, sought an indemnity prior to distribution.

[73] In drafting the deed, Ms RQ was required to follow her client's instructions.

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[10] Mr YG, correspondence to LCRO (1 April 2021) at [40].

[74] The complainants assert that request to either sign or risk delay in achieving an interim distribution was subjecting them to improper pressure. Ms RQ argues that the need for urgency was occasioned by the impending closure of her office for the Christmas break.

[75] But this argument inevitably returns to the question as to where Ms RQ's duties and obligations lay.

[76] Her obligation was to follow and implement her client's instructions.

[77] The beneficiaries were entitled to raise objection to executing the deed and did so.

[78] There is no suggestion that Ms RQ attempted to coerce or pressure the beneficiaries. On receipt of Mr EL's correspondence, she made the decision to withdraw from acting.

[79] Ms RQ owed limited duties to the beneficiaries. The complaints which engage allegation that Ms RQ failed to maintain appropriate standards of professionalism in her conduct engage matters that are most appropriately directed to Mr HM as executor.

Did Ms RQ respond to requests for information from the beneficiaries in a timely manner?

[80] This aspect of complaint must be considered from the context (as discussed above) of Ms RQ's limited obligations to the beneficiaries.

[81] It was Mr HM's responsibility as executor to report to the beneficiaries.

[82] Rule 7.2 of the Rules requires a lawyer to promptly respond to requests for information from their client.

[83] Mr HM was Ms RQ's client.

[84] That said, in the period engaged by the first retainer (April 2018 to December 2018), Ms RQ did on occasions communicate directly with the beneficiaries.

[85] I have carefully examined the requests made of Ms RQ to provide information (clarification of the estates financial position) in the period April 2018 to December 2018, and have referenced those requests made to correspondence in which Ms RQ gave indication that Mr HM would provide response, and considered the responses provided alongside the progress in the work that was being done, and with

consideration to the milestones achieved which would reasonably have required the executor to provide an update to the beneficiaries.

[86] Ms RQ wrote to the beneficiaries on 4 May 2018, to provide summary of matters discussed with two of the beneficiaries and Mr HM at an initial meeting, and to advise that application would shortly be made for probate. She concludes her correspondence with indication to the beneficiaries that she will "be in touch" and advice to them that they should not hesitate to contact her if they required her assistance.

[87] Whilst it was the case that it was Mr HM's primary responsibility to communicate with the beneficiaries, it would have been reasonable of the beneficiaries to have assumed from Ms RQ's initial correspondence that their enquiries could be directed to her, and that she would respond to them. The beneficiaries could not have been expected to turn their mind to the question as to whether communications should be directed to Mr HM or Ms RQ. They had been advised that Ms RQ would be in touch with them and that she was receptive to providing assistance when required.

[88] When the complainants became concerned that they were not being kept sufficiently in the loop, it was not unreasonable of them to have formed a view that Ms RQ had responsibility to report to them.

[89] However, having scrutinised the exchanges between Ms RQ and the beneficiaries that took place in the period April 2018 to December 2018, I am not persuaded that there is evidence of a failure on Ms RQ's part to communicate with the beneficiaries such as could engage a consideration as to whether she had breached her obligation to engage courteously with the beneficiaries.

[90] Probate was granted on 27 June 2018, following which a statement of assets and liabilities was prepared to accompany an interim report. On 20 July 2018, the beneficiaries were provided with an updated report.

[91] In October 2018, after receiving indication from the executor that there had been no agreement reached by the beneficiaries as to how various estate items were to be distributed, Ms RQ wrote to the beneficiaries inviting them to provide her with suggestions as to how matters could be progressed.

[92] In correspondence to the beneficiaries of 7 December 2018, Ms RQ advised that the executor considered that the time was appropriate to facilitate an interim distribution. At this point, objection was raised to the executor's request of the beneficiaries to execute the deed of distribution and Ms RQ understandably, having

been advised by the lawyer instructed by two of the beneficiaries that consideration was being given to filing a complaint with the New Zealand Law Society Complaints Service, terminated her retainer with Mr HM.

[93] In further correspondence of 12 December 2018, Ms RQ advised the beneficiaries that they had been provided with regular updates, reports and advice on progress, in particular, amended plans for remediation of the apartment.

[94] The evidence does not support the contention that Ms RQ failed to deal courteously with the beneficiaries during the period of their first retainer.

[95] The second retainer entered into on 21 January 2019, detailed the scope of the retainer as being limited to the general and legal administration of the estate at the direction of the executor. The retainer specifically recorded that all dealings with and reporting to the beneficiaries, would be the responsibility of the executor. This could not be clearer. Having previously received indication of possibility that a conduct complaint would be made against her, and having been alerted to concerns raised by two of the beneficiaries that they considered that Ms RQ had not adequately communicated with them, Ms RQ would understandably have been cautious to ensure that there was no misunderstanding that Mr HM, in his capacity as executor, would be solely responsible for communicating with the beneficiaries.

Did Ms RQ act competently and in a timely manner in relation to the administration of the estate?

[96] I am not persuaded that Ms RQ was responsible for delays that were perceived by the complainants to have occurred in finalising the administration of the estate.

[97] Finalising the grant of probate was promptly attended to. Ms RQ's initial retainer concluded in December of 2018. There is no evidence to support contention that in the period April 2018 to December 2018, a lack of activity on the part of Ms RQ caused unnecessary delay.

[98] It is clear that there was a degree of disagreement amongst the beneficiaries which appears to have contributed to some delay, but importantly, difficulties in addressing weathertight issues with the apartment owned by the estate, and a degree of uncertainty as to whether one of the beneficiaries wished to exercise an occupation right to the apartment, impeded progress in finalising the administration of the estate.

[99] The lawyer tasked with undertaking the cost assessment for the Committee, had considerable experience in managing estates. Having undertaken a complete review of Ms RQ's file, the assessor concluded that whilst the administration appeared to have taken some time for what was a relatively modest estate, he could identify no periods of time where nothing was done or achieved. I consider it reasonable, considering both the experience of the assessor and the extent of his review of the file, that some weight be accorded the assessor's view on the issue as to whether matters were progressed in a timely manner.

Were the fees charged by Ms RQ fair and reasonable for the services provided?

[100] Ms RQ rendered four invoices (exclusive of GST and disbursements):

(a) 1 August 18 $5,670.00

(b) 28 August 18 $2,235.00

(c) 12 December 18 $4,250.00

(d) 30 August 19 $3,500.00

[101] Ms RQ did not compile a record of her time recorded on the file.

[102] I agree with the Committee's conclusion that it would have been desirable for Ms RQ to have maintained time records. It considered that its ability to assess the fee was hampered by the absence of records and determined to appoint a costs assessor to review Ms RQ's file.

[103] Concern regarding fees charged was at the nub of the concerns raised by the complainants.

[104] Whilst the complainants identified some specific areas (not extensive) where they considered Ms RQ had charged for services that had not been provided, and contended that Ms RQ had carried out work that was outside the scope of her brief, the major objection raised by the complainants was concern that Ms RQ had carried out work that could more appropriately have been attended to by Mr HM or, alternatively, delegated to a family member.

[105] The complainants considered that much of the work carried out by Ms RQ could fairly be described as "menial". Charging an hourly fee of $350 to carry out low level administrative tasks had resulted, argued the complainants, in fees being charged that were unreasonable.

[106] On review, Ms BK submitted that the process of assessing as to whether a fee charged was fair and reasonable could not fairly be arrived at through the process adopted by the Committee (that is, by stepping back and undertaking a balancing exercise), but should be undertaken by measuring the time spent by the lawyer in working on the file, against the hourly rate charged. It was Ms BK's view that the clients had a clear expectation that their lawyer's fees would be calculated by reference to time spent on the file.

[107] The Committee's cost assessor concluded that the fees charged were high for the work involved and considered a reasonable fee for services provided to be $11,810 (exclusive of GST and disbursements). This represented a reduction of $3,845 on the fee charged by Ms RQ.

[108] The explanation advanced by Mr AJ to support his view that the fee charged was unreasonable, focused on argument that he considered that much of the work that had been done involved relatively straightforward administrative matters that could have been competently managed by a legal executive. Mr AJ concluded that a charge out rate of $350 an hour was excessive. He considered a charge out rate of $250 per hour across the board would have been more appropriate.

[109] The Standards Committee (which as I have noted included members with experience in estate administration), did not consider that the fee charged stood out as being excessive for the services provided. It considered the fee to be within the range that would customarily be charged in the market and locality for similar legal services.

[110] Nor did the Committee agree with its assessor, that all (or most) of the attendances could or should have been carried out by a legal executive, thus attracting a lesser charge out rate. It considered that whilst some of the attendances may have more appropriately been charged at a lower rate, there were elements of the retainer which would have merited the higher rate charged.

[111] But adopting the well accepted approach of stepping back, balancing the relevant factors and considering the fee in the round, the Committee was satisfied that the fee charged was fair and reasonable having regard to the interests of both lawyer and client.

[112] I am confronted then when carrying out, as I am required to do, an independent assessment as to the reasonableness of the fee charged, with the task of providing a further assessment of the fee in circumstances where a Committee of experienced practitioners and a cost assessor with considerable experience in estate

administration, have reached differing views as to whether the fees charged were excessive.

[113] I agree with the Committee, that the appropriate approach when considering a fee, is to firstly address the rule 9 factors, then to step back and undertake the necessary balancing exercise.

[114] Whilst Ms BK would understandably consider that Mr AJ's report supported her view that much of the work undertaken by Ms RQ was relatively routine, Mr AJ correctly observed that it had been frequently held, that undue reliance should not be placed on time records when considering a fee.

[115] The commencing point is an examination of Rules 9 and 9.1.

[116] Rule 9 provides:

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

[117] Rule 9.1 provides:

> **Reasonable fee factors**
>
> 9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:
>
> (a) the time and labour expended:
>
> (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
>
> (c) the importance of the matter to the client and the results achieved:
>
> (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
>
> (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:
>
> (f) the complexity of the matter and the difficulty or novelty of the questions involved:
>
> (g) the experience, reputation, and ability of the lawyer:
>
> (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
>
> (i) whether the fee is fixed or conditional (whether in litigation or otherwise):

(j) any quote or estimate of fees given by the lawyer:

(k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and the client:

(l) the reasonable costs of running a practice:

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

[118] Referring to the relevant authorities, this Office has observed that considerations to be taken into account when determining whether a fee is fair and reasonable include: [11]

(a) Setting a fair and reasonable fee requires a global approach;

(b) What is a reasonable fee may differ between lawyers, but the difference should be "narrow" in most cases;

(c) While time spent must always be taken into account it is not the only factor;

(d) It is not appropriate to (as an invariable rule) multiply the figure representing the expense of recorded time spent on the transaction by another figure to reflect other factors.

[119] The High Court has held that it is:[12]

> … the obligation, which is clear from a number of authorities, for a practitioner who is using time and attendance records to construct a bill, to take a step back and look at the fee in the round having regard to the importance of the matter to the client, in some cases the client's means, the value to the client of the amount of work done, and proportionality between the fee and the interim or final result of the legal work being carried out.

[120] Because the process of determining a fair and reasonable fee is "an exercise in balanced judgment - not an arithmetical calculation":[13]

> … different people may reach different conclusions as to what sum is fair and reasonable, although all should fall within a bracket which, in the vast majority of cases, will be narrow.

[121] For that reason, this Office has referred to there being a "proper reluctance to "tinker" with bills by adjusting them by small amounts," and that it "is therefore appropriate for Standards Committees not to be unduly timid when considering what a fair and reasonable fee is." [14]

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[11] *Hunstanton v Cambourne* LCRO 167/2009 at [22].
[12] *Chean v Kensington Swan* HC Auckland CIV-2006-404-1047*,* 7 June 2006 at [23].
[13] *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 at 441.
[14] Above n 11, at [62].

[122] Having given careful attention to both the Standards Committee decision, and to the report of its cost assessor, and having:

(a) scrutinised the accounts; and

(b) considered the work that was undertaken; and

(c) perused the file; and

(d) considered the conduct rules:

I conclude that the fees charged were fair and reasonable.

[123] In reaching that view, I considered it significant that a Committee which included members with experience in estate administration, had reached conclusion that the fee charged fell within the range of fees they considered would be customarily charged in the market and locality for similar legal services.

[124] I also consider it significant that Mr HM raised no objection to the fee.

[125] Whilst I appreciate that Mr AJ was concerned that much of the work that was undertaken was, in his view, relatively straightforward, his broadbrush approach to recalculating the fee by amending the hourly charge out rate presented as overly rigorous.

[126] It was an approach which, in my view, placed disproportionate emphasis on the factor in r 9.1(f).

[127] Mr AJ considered that much of the work could have been carried out by a legal executive. But Ms RQ was not a legal executive. She was a solicitor in sole practice, responsible for meeting the costs involved in running a practice, and exposed to the risks that inevitably carried.

[128] There is suggestion in the cost assessor's report that Ms RQ may have previously been employed by Mr HM. If that was the case, it could have been reasonably expected of Mr HM that when instructing Ms RQ, he would have confidence that she would capably attend to the work that she was required to complete.

[129] There is no indication of Mr HM having instructed Ms RQ to delegate less complex administrative work to an assistant (she did not have one), or indication that he was expecting anything less of Ms RQ than that she would personally attend to all of the day to day administrative matters.

[130] Ms RQ provided Mr HM with a letter of engagement that clearly recorded the basis on which fees would be charged.

[131] When Mr HM made the decision to reinstruct Ms RQ in January 2019, he did so from the background of having received three invoices from Ms RQ that had identified the nature of the work that had been done and provided assessment of time spent (unsupported by evidence of time records).

[132] It would have been apparent that Mr HM would have understood the basis on which the estate was being charged and the nature of the work that had been done.

[133] The complainants were quite within their rights to challenge an account that they considered was excessive, but it was the executor who had responsibility to provide appropriate oversight of the management of the estate.

[134] Mr AJ noted that any practitioner familiar with managing estates, would have experience of managing estates where documents (emails, letters, statements, reports et cetera) accumulated to a degree that most beneficiaries could not appreciate or understand. He noted that he was not surprised by the volume of paperwork on the file. He also observed that keeping track of investments, maturity dates etc required special skill, and that it was all too easy to lose track of where various matters were, at any one time.

[135] This was a modest estate, complicated by one particular issue, but Mr AJ does not suggest that Ms RQ carried out work that was unnecessary or that she was inefficient in the manner in which she managed the work. His concern was that Ms RQ's hourly rate was too high for much of the work that was required to be completed.

[136] The methodology adopted by Mr AJ in achieving his final calculation, proceeds from assumption that a standard fee of $250 per hour plus GST represents a fair fee for straightforward estate work. Ms RQ challenges that methodology and argues that to adopt that approach would be to standardise the rate for routine estate work.

[137] I do not consider that Mr AJ was advocating the position as argued for by Ms RQ. Mr AJ, following a careful examination of the file, had concluded that a significant amount of the work that had been completed by Ms RQ was straightforward. He considered that a charge out rate of $250 presented as a fair charge out rate. He was not, in my view, advancing suggestion that all estate work of a particular nature could properly be charged out at the same rate. It was his view, that a significant amount of the work on the file he had examined, merited an hourly charge out rate of $250.

[138] Whilst the importance of considering the specific fee factors is frequently emphasised when a review of a lawyer's fee is undertaken, a lawyer is required when assessing an appropriate fee, to consider the nature of the services provided, and ensure that the fee pays proper regard to the interests of the client and the lawyer.

[139] It is reasonable that a lawyer adjust their fee to reflect the difficulty of the work involved. It is also reasonable to expect of a lawyer that in circumstances where the nature of the work undertaken was largely of an administrative nature, accommodation would be made for the normal hourly rate.

[140] But it was not the case that all of the work undertaken by Ms RQ could be categorised as falling into the purely administrative category.

[141] Application was made for probate. Work was completed (on her client's instructions) in preparing the deed of distribution. She attended on the beneficiaries and provided guidance on matters concerning the progress of the administration.

[142] Whilst regrettably Ms RQ neglected to keep time records, after considering the volume of material on the Standards Committee file provided (not a complete record) I am satisfied that Ms RQ's estimate of time spent on the file presented as realistic.

[143] Whilst Ms BK identifies areas where she considered that Ms RQ had recorded work being done that had not been done, I am unable on the evidence before me to conclude with certainty whether that had occurred, but I am satisfied that if mistake was made, the mistake was minor and carried little consequence for the overall bill.

[144] Nor was I persuaded that Ms RQ's decision to record time spent reading emails from a beneficiary was work that should not have been charged for. As the lawyer acting for the estate she was obliged to read correspondence received that referenced matters relating to the estate and entitled to charge for time spent perusing the emails received.

[145] Suggestion that Ms RQ was unable to charge for work spent on drafting the deed of distribution as the deed was, as described by the complainants "unlawful" has been addressed above. Ms RQ was instructed to prepare the deed. She was entitled to be paid for work done.

[146] When conducting a review, a Review Officer is required to bring a robust and independent approach to a consideration of the issues. Having done so, I agree with the Committee's view that the fee charged was fair and reasonable.

[147] Whilst I am required, as noted, to provide an independent view, I consider it proper to accord weight to the Committee's conclusion that it considered the overall fee charged was not out of kilter with the Committee members' understanding of the level of fee commonly charged for the estate work of the nature completed.

Publication

[148] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision

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

DATED this 27th day of August 2021

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R Maidment
Legal Complaints Review Officer

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

Ms BK as the Applicant
Ms RQ as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society