LCRO 377/2013

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| **CONCERNING** | an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | a determination of [City] Standards Committee [X] |
| **BETWEEN** | **MC and others**<br>Applicant |
| **AND** | **ND**<br>Respondent |

## DECISION

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

### Introduction

[1] Ms MC complained on behalf of herself and eight others that OP Lawyers had not adhered to a fee agreement with the result that the group's fee budget was exhausted before the retainer was completed. The group was then obliged to appear for themselves in an application to the High Court by the [Town] Council to terminate the leases of the group's residential properties.

### Background

[2] In general terms, Ms MC engaged Mr ND to act for the group of lessees in their dispute with the Council. In a letter of engagement dated 29 July 2011 Mr ND advised:

> 14. In terms of costs going forward, we have estimated to [Ms MC] that if we have to go down a litigation pathway, our fees will be something in the region of $5,000-$10,000 + GST and disbursements (such as court filing fees and travel expenses) at a minimum, but it is important that you understand that this could balloon if extensive litigation work is required.

[3] An initial sum of $10,080 was paid into OP Lawyers on account of costs for that firm and for the costs of a barrister subsequently engaged (Mr PA).

[4] By May 2012 further funds were required and following discussions between the parties and Mr PA a further sum of $10,0800.19 was paid. Ms MC advised this was the maximum amount the group could afford to pay for legal costs.

[5] In June 2012 it became evident this amount was going to be insufficient and Mr PA advised that he had proceeded on the basis that the figure of $20,000 was in addition to the $10,000 already paid.

[6] This effectively meant that Ms MC and her group were unable to continue to fund OP Lawyers and Mr PA and withdrew their instructions. Their inability to fund further legal representation resulted in them having to represent themselves in court.

**The complaints**

[7] All nine lessees signed a letter of complaint in which they advised they were upset Mr ND and Mr PA had reneged on what they saw as an agreement to represent them for the sum of $20,000 through to and including the Court hearing. They did not accept the fee could double or quadruple beyond Mr ND's initial estimate.

**The Standards Committee determination**

[8] The complaint progressed as a complaint against Mr ND. The Standards Committee identified the two issues for consideration as being:

(a) Was there any binding agreement between Mr ND and the lessees to take the matter through to trial for a fixed fee?

(b) Did any conduct issues arise out of the estimate provided by Mr ND, in circumstances where the estimate was exceeded?

[9] It determined that there was no binding agreement for Mr ND to take the matter through to hearing for the sum of $20,000 and that as the retainer had been terminated by Ms MC and her co-lessees, he had no ethical obligation to take any further steps in relation to the matter.

[10] The Committee however considered that the estimate provided by Mr ND was "unrealistic, inadequate and therefore misleading".[1]

[1] Standards Committee determination dated 4 November 2013 at [52].

[11] The Committee determined that Mr ND had thereby breached rule 11.1 of the Conduct and Client Care Rules[2] (misleading and deceptive conduct) and determined that his conduct constituted unsatisfactory conduct pursuant to s 12(c) of the Lawyers and Conveyancers Act 2006.

[12] The Committee then recorded its determination as to penalty as follows:[3]

> However, given that Mr ND did provide significant legal support to the complainants (the lessees), the work was done at a reduced rate, the complainants were notified of the fact that the estimate had been exceeded and agreed to increase it, and there is no evidence of any loss, it has determined that no orders under s 156 (and therefore no penalty) should follow.

**Application for review**

[13] Ms MC and her co-lessees are unhappy with that outcome and have applied for a review of the determination. In particular, they consider there should be some public accountability by means of publication of the finding, and presumably Mr ND's name. In addition, they take issue with the statement by the Committee that there was no evidence of any loss for which they should be compensated. They seek repayment of the fees paid.

[14] Ms MC refers to these as being the fees paid to OP Lawyers, but part of the funds had of course been remitted to Mr PA in payment of his fees.

**Scope of review**

[15] On being notified of the review application Mr ND himself raised issues in the Standards Committee determination with which he was dissatisfied. He advised that he had not intended to seek a review of the determination himself but now that Ms MC had sought a review, he wished the matters raised by him to be addressed.

[16] Ms MC has objected to those matters being included in the review on the grounds that if they were to be considered, it would mean that Mr ND was thereby able to have the issues he was concerned with considered on review, although he had not himself sought a review and was out of time to do so.

[17] Ms MC's objection requires an explanation of the nature of a review. Section 203 of the Lawyers and Conveyancers Act 2006 enables the LCRO to review all or any

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[2] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[3] Above n 1 at [62].

aspect of an inquiry by a Standards Committee and its determination. In *Deliu v Hong* [4] Winkelmann J noted that:

> 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.

[18] It follows therefore that once a review application has been made, all issues raised in the course of the complaint, the inquiry, and the Standards Committee determination, fall to be considered by the LCRO.

[19] Consequently, the matters raised by Mr ND fall within the ambit of this review.

**Who is the respondent?**

[20] Ms MC expressed her complaint as being against OP Lawyers, noting that her contact had been with Mr RB and Mr ND. In addition, Mr PA played a part in the events that unfolded.

[21] OP Lawyers is not an incorporated law firm and consequently the complaint could not proceed against the firm. In his response to the review application Mr ND makes the point that he signed the letter of engagement on behalf of the firm, and the letter of engagement[5] records that Mr RB would have overall responsibility for the matter. The paragraph referred to also records that Mr RB would be assisted by Mr SC and Mr ND.

[22] In considering this issue[6] the Standards Committee did not agree that any adverse finding should be against OP Lawyers. In the first instance (although not referred to by the Standards Committee) OP Lawyers is not an incorporated law firm as noted. It follows therefore that any adverse finding would need to be against Mr ND or Mr RB.

[23] A submission that Mr ND was at all times acting as an agent of OP Lawyers carries no weight. If that submission was taken to its logical extent, it would mean that there could never be any disciplinary outcome against an employed solicitor. That is clearly not the case.

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[4] *Deliu v Hong* [2012] NZHC 158 at [41].
[5] OP Lawyers letter of engagement (29 July 2011) at [25].
[6] Above n 1 at [58].

[24] Mr ND was the person who had the carriage of the file notwithstanding overall supervision by Mr RB. More importantly, there has been no evidence adduced by the firm that it was Mr RB who made the assessment of fees and/or was responsible for the misunderstanding. All of the evidence provided shows that all conduct in relation to the provision of the estimates, and indeed, the majority of communications were conducted by Mr ND.

[25] I therefore consider that the Standards Committee has correctly identified that Mr ND is the lawyer against whom the complaint should proceed.

**The correspondence about fees**

[26] The issues that arise with regard to fees are:

(a) Was there a fixed agreement?

(b) Were the estimate(s) properly given?

[27] To reach a view on these issues I have identified and record here the communications that took place with regard to fees.

*Email ND to MC 21 July 2011:*

> It is very difficult to estimate what fees might be, but you should expect that it would be something in the region of $5,000-$10,000+ GST and disbursements, but it could be a lot more if each lease has to be dealt with individually rather than as a consolidated group.

*Email ND to MC 22 July 2011:*

> …the firm will want $6,000 as an initial up-front payment as a contribution to fees and costs. That would also include the filing fee discussed.
>
> The above figure is on the assumption that the matter will end in litigation, which as previously discussed can be open-ended and thus difficult to assess the costs of …
>
> …should the matter proceed to litigation the above amount is probably about the minimum that you should expect in legal costs …

*Email MC to ND 24 July 2011:* "We would like to ask that if the action reaches the $9,000 mark, that we are notified; this will help us manage our finances".

*OP Lawyers – letter of engagement – 29 July 2011:*

> 12. We will also closely monitor our fees and will advise when we have approached $9,000 in work in progress (including GST) and disbursements.
>
> …

14. In terms of costs going forward, we have estimated to MC that if we have to go down a litigation pathway, our fees will be something in the region of $5,000-$10,000 + GST and disbursements (such as court filing fees and current expenses) at a minimum, but it is important that you understand that this could balloon if expensive litigation work is required.

*OP Lawyers' terms of engagement – 29 July 2011:*

6.0 Quotes/estimates.

6.1 We do not generally give quotes about the cost of any work undertaken. We will not be bound by any "quote" as to future fees unless it is, in writing, expressly described as "a quote" and has been signed by a partner of the firm.

6.2 An "estimate" is merely an opinion as to possible future costs. We will give estimates in good faith and using all reasonable care, but in no circumstances will an estimate be binding on us or limit our right to recover our remuneration charged in accordance with Clause 5.

*Email ND to MC – 22 September 2011:*

…litigation seems imminent.

costs is however a serious issue given the Council's attitude. Given they don't seem willing to negotiate it becomes questionable as to whether or not we can assist you in a cost effective manner going forward.

With your permission and that of the other lessees, we would use the money paid in to cover our fees and disbursements in opposing any application by the [Town] Council (which are still wholly intact and are sitting in our Trust Account) to pay for any valuation. This may require us to come back to you for further fees sooner rather than later, but should leave sufficient funds for us to file oppositions.

*Letter ND to MC – 23 December 2012:*

1. To date we have been progressing this matter on that basis that we believed the [Town] Council could be persuaded to resolve this matter outside of the court process.
…

12(b) Resist Council legal action – this means allowing matters to continue as they are and resist applications for occupation by the [Town] Council as they occur on an individual basis … the problem with this approach is that it is piecemeal and if all matters have to be approached in this manner it could lead to quite high costs.
…

24. We have not billed you to date. At the present time we have recorded slightly over $5,000 plus GST in chargeable time against this matter … we will however write this down to $2,000 plus GST and disbursements and have now rendered you a fee for this.
…

25. However going forward and depending on the manner in which you wish to advance this matter, we will need to be clear on your instructions in regard to fees. Originally, the funds that have been paid into us were provided for the purpose of preparing oppositions to any applications by the Council under

> their Property Law Act Notices (such as one made against RV and MC). We are happy to proceed on that basis if you decide on either of the first two options.

*Email MC to ND - 19 January 2012:*

> We wish to see our funds used for filing our papers once Council serves notice so we prefer you do not enter into any further discussions with Council or their lawyers.

*Email ND to MC – 23 January 2012:*

> We also need to make sure you and the other lessees are happy with the funds provided to date being used in this way, and that there is an ability for you to meet costs going forward. We certainly expect to be able to prepare oppositions and affidavits in support with the funds in place, and that if we can use your matter as a test case then hopefully there will still be a surplus from what has already been paid (or at least the work done in preparation for it can be used in other matters as well but there is still the costs of litigating this matter going forward to contend with. Barristers fees for any hearing even without an opinion and with us doing the paper work will probably cost at least $5,000 for a one day matter, and I am not sure we can make what we are still holding stretch to cover this. It is difficult for us to estimate what this matter may end up costing beyond the very general ball park figures given before, but there is little point in starting down this pathway only for you to find yourself halfway there but without any further ability to progress the matter, so please let us know how you propose to raise funds going forward if further are needed.

*Email MC to ND – 24 January 2012:*

> We spoke about costs and we understand that we need to be prepared for further expense so we have all agreed to this. Even if we were to have one or two drop out (unlikely) those of us remaining would cover this.

*Email ND to PA – 30 January 2012:*

> We hold just under $7,500 in trust on this matter which can be applied to defending the current application … they also understand that they may need to pay in further funds as the matter progresses but have not indicated at this point how they will raise these funds.

*Email PA to MC and ND – 3 May 2012:* "I do think that now might be a good time to discuss how much you do have available and some realistic expectations in terms of costs."

*Email MC to PA cc ND – 3 May 2012, 9.28 pm:*

> Have just been talking with some of the lessees about the finances and we will have a meeting Monday night to ensure everyone gets their say but it is looking like we would go to around $20,000 for this but will need to confirm this.

*Email PA to MC cc ND -3 May 2012, 10.05 pm:* "Is the sum of $20,000 from now or inclusive of what you have spent to date? If the latter, how much have you left?"

*Email MC to PA cc ND – 4 May 2012:* "Firstly, the $20,000 is a total so this may make a big difference to this but we too would love to see those opinions …"

*Email MC to ND – 4 May 2012:* "One last thing, with the $20,000 in total, do you think this could stretch to the application to release the legal opinions or not?"

*Email MC to ND and PA – 7 May 2012:*

> We have had our meeting tonight and we have got agreement to go up to $20,000 for this legal battle and if this amount will cover it, then we have got agreement to go for the interlocutory application to release the legal opinions.

*Email ND to MC cc PA – 14 September 2012:*

> I refer to our conversation about fees the week before last. I have since spoken to [PA] about his understanding of the fee arrangement and there seems to have been some confusion which is probably down to us.
>
> When I called you to note that funds in trust were running low and further funds might need to be paid I confirmed that your $20,000 budget was the budget that we were working within to take this matter through a trial, but that "further funds would likely be needed if there were issues beyond trial. You advised that this $20,000 budget included all the fees that you have spent to date. I confirmed that was our understanding too (which was based on your emails to us in early May 2012), but although I did not mention this to you at the time I was concerned by this because while we were speaking it occurred to me that PA was working on the assumption that this was not the case. I was a bit taken aback by this because it also occurred that if there was any misunderstanding over fees it is likely my fault for not picking up on this in my conversations with PA given I should have recalled the correct position from your emails.
>
> I spoke with PA after our conversation and he confirmed that he had indeed understood that there was $20,000 to cover costs from early May when the budget was advised until trial. He had in fact made his estimate of being able to take the matter to trial on this understanding.
>
> This puts us in a position where we will simply be unable take this matter to trial while meeting our obligations to pay PA from the remaining funds, even with his significantly reduced fees.

*Email MC to ND cc PA - 16 September 2012:*

> When we started out on this journey, we were quoted "something in the region of $5,000-$10,000 + GST and disbursements."
>
> We have always been very clear about our finances and to ensure we were not in debt later, we paid up-front.
>
> We were clear in both our email plus on the phone to both yourself and PA on Wednesday 9 May 2012 - this phone conversation was expressly about the money available; not being drawn into spending money we did not have; realistic expectations to ensure no surprises down the track, and; the need to concentrate on the bigger picture.
>
> Our total was $20,000; this was already substantially higher than the above amount. It was not $20,000 plus $10,000 making a $30,000 total but $20,000 total in all as was paid into the OP bank account in two amounts of $10,080.00
> ($160 over the $20,000).

*Email signed by all lessees - 21 September 2011:*

> We would like to express our appreciation of the work both PA and you have carried out on our behalf, however, we are in full agreement that we only ever agreed to $20,000 in total for this legal battle and that was to carry this through trial as you correctly acknowledged.
>
> It is unacceptable to us that our agreement to go through trial on $20,000 has not been honoured and it appears, there are now expectations by OP Lawyers of ongoing further funds from this, although this has never been agreed to by us. You will understand that we are very concerned and it would seem we have no option but to withdraw from engaging your legal services and would expect that as there was no prior agreement with us, no further charges will be forthcoming from OP Lawyers.

**Was there a fixed fee agreement?**

[28] At paragraphs [39] to [44] of its determination the Standards Committee examined this question in some detail and concluded that although Ms MC and her group clearly indicated their budget was $20,000 and they could not go beyond that, there was no agreement or acceptance by Mr ND that he would complete all work through to and including the hearing for that figure.

[29] It would seem that Mr PA did not take note of the limitations communicated to him and Mr ND by Ms MC, particularly where she made it quite clear that the sum of $20,000 for fees included the amount already paid into OP Lawyers and it then became impossible for Mr ND to work within the group's budgetary constraints.

[30] It could be argued that by continuing to provide legal services after Ms MC had made it clear the sum of $20,000 represented the group's maximum budget, Mr ND had accepted that as a term of the contract to provide legal services. The complaints process is not the proper forum to be determining contractual issues. In addition, all of the communications with regard to fees from OP Lawyers make it clear that any figure provided for fees was an estimate only.

[31] The Committee addressed this issue in some detail. I endorse the Committee's reasoning in the paragraphs referred to and confirm its conclusion.

**Were the estimates properly given?**

[32] In the email dated 21 July 2011 and the letter of engagement dated 29 July 2011, Mr ND advised Ms MC that fees would be in the region of $5,000 to $10,000 plus GST and disbursements, but if "extensive litigation" ensued, then this could "balloon".

[33] At paragraph [31] of the submission in response to the complaint dated 1 March 2013 Mr ND says:

> In the context of that email, [dated 21 July 2011] it is clear that the fees related to opposing the Property Law Act Notices that had been issued only (i.e. at this point we had not provided any estimate for costs outside of that court process). The total estimate to that point was therefore $10,000 to $15,000 exclusive of GST and disbursements.

[34] I do not understand how that comment can be made. There had only ever been one estimate of fees provided in the email of 21 July, and repeated in the letter of engagement dated 29 July. Both statements refer to an estimate of $5,000 to $10,000 plus GST and disbursements and that is the understanding Ms MC had and referred to in her letter of complaint.

[35] In his response to the review application[7] Mr ND submitted:

> In response to these findings, we say:
>
> a. It is wrong to assess this estimate in hindsight from 23 September 2012 as this is to assess the estimate outside of the context in which it was provided.
>
> When the estimate was given in July 2011, it was in anticipation of an opposed originating application ([29]-[31] of our submissions of 1 March 2013). It was not an estimate for what the proceedings would eventually become - that is, effectively a full High Court trial with the associated potential for interlocutory steps (limited discovery being ordered in February 2012 - Chisholm J's minute in respect of this was not before the Standards Committee but can be provided on request), a Judicial Settlement Conference and the prospect of a full day or more hearing.
>
> That the proceedings would take this far more complex and involved route was not envisaged at that time, and when it was, revised estimates were duly provided (i.e. OP Lawyers letter of 23 December 2011; ND email of 23 January 2012).
>
> …

[36] In her initial comprehensive five and a half page letter of 6 May 2011 to OP Lawyers, Ms MC began with the statement: "We, nine lessees, are facing future cancellation of our [Town] District Council leases for non-payment". She advised that "the lessor has notified some of the nine lessees that it intends to file legal action to cancel the lessees' leases – Property Law Act 2007, section 244, 245 and 249, as from 7 July 2011". She described that the problem arose from variations of the individual leases which the lessees claimed had been done without proper advice or their knowledge. These variations related to the period of rent reviews (from 21 years to 7 years) and the definition of a "fair annual rent".

[7] Submissions in reply dated 7 February 2014 at [29].

[37] She also advised that Council had "flatly refused to meet with lessees other than to offer a meeting with individual lessees to determine how they will pay their rent owing". Council was clearly not prepared to negotiate with the lessees as to the validity of the terms of the lease variations.

[38] Ms MC set out what the group wanted to achieve and advised that some of the group had refused to pay the increased rentals demanded by Council. Those lessees were clearly exposed to cancellation proceedings as indicated by her.

[39] In his letter of 23 December 2011 (mistakenly dated 2001) to the lessees, Mr ND stated:

> 1. To date we have been progressing this matter on [the] basis that we believed the [Town] Council could be persuaded to resolve this matter outside of the court process.
>
> 2. There were a number of reasons for taking this approach, the main one being that it was reasonable to expect that the [Town] Council would approach this matter in a sensible commercial manner that avoided inflicting the costs and hassles of litigation on the rate payer if a reasonable alternative was available. We have also considered that despite your outstanding fighting spirit the undeniable costs of litigation to you were best avoided if possible, although we have remained on standby to file oppositions to any applications for occupation orders at short notice if required.
>
> 3. The recent letters of 20 December 2011 from [Law Firm] indicate however that the Council will not deal with this in a commercial manner, and indicates that they are looking to progress these matters by dealing with you individually through separate applications for orders for possession rather than by collective action.
>
> 4. This requires us to now reassess your position and our own tactics.
> …

[40] These statements reveal that in accepting instructions, and notwithstanding his advice as to potential costs in his correspondence of 21 and 29 July that indicated estimated costs included litigation in some form, Mr ND primarily believed when he gave the initial estimate, that the matter would be resolved by negotiation with Council.

[41] In the circumstances as presented to OP Lawyers, the difference between "an opposed originating application" and a "full High Court trial" is not as significant as Mr ND submits. The lessees' defence to the originating application would have involved obtaining and presenting evidence as to why the variations of leases should not be binding on the lessees and the research and presentation of legal argument.

[42] Alternatively, if Mr ND anticipated that opposing the originating application would have been sufficient to dispose of the matter, then this again was unduly optimistic, given the position adopted by Council as advised by Ms MC. Mr ND should have made it clear what he considered he was including within his estimate and explained the likely or potential scenarios that could unfold.

[43] I consider that Mr ND was unduly optimistic in his initial estimate to Ms MC and he did not take full note of the facts as presented by her and the history to date with Council. He also failed to consider that Council would not have wanted a precedent set whereby its leases could be challenged and it was unsurprising that it would seek to enforce their terms.

[44] An alternative way of looking at the matter is that Mr ND encouraged Ms MC to pursue litigation by providing a low estimate and the group then became committed to a course of action which they may not have otherwise embarked on if they had been advised at the commencement of instructions that fees could escalate to $30,000 or more. This is what Ms MC refers to when she accuses Mr ND of entrapment. This accusation cannot be sustained to the necessary degree to find against Mr ND on that basis but I can understand Ms MC's point of view.

[45] I acknowledge Mr ND did hedge his estimate with indications that costs could escalate but on the information known to him at the outset, the estimated fee of $5,000 to $10,000 was unrealistic. That is the view of the Standards Committee and I confirm that and the finding of unsatisfactory conduct which followed.

**What should be the outcome?**

[46] A similar scenario was considered by me in *Mr B P v Mr Y F.*[8] In that case the lawyer estimated a fee of $4,000 to $5,000 whereas the total fees rendered came to $17,782.50. In that case, there was nothing that could be identified as taking place between the time of the estimate and the completion of the retainer that could not have been anticipated.

[47] In the present matter due allowance must be made for the fact that matters unfolded somewhat differently than anticipated by Mr ND, but I question whether his expectation of how matters would proceed was realistic. The estimate of $5,000 to

[8] *Mr B P v Mr Y F* LCRO 142/2010.

$10,000 must be measured against the potential fee of $30,000 or more to complete the retainer through to the end of the hearing.

[48] I question whether the estimate of costs should have been given without discussing the matter with the barrister who was to be engaged. It was anticipated at the outset of the instructions that it would be necessary to engage a barrister and although hourly rates were discussed, I have seen no evidence that there was any consultation at the commencement of the retainer with the barrister as to the likely costs that would be entailed in the proceedings.

[49] The alternative view, and that held by Ms MC, is somewhat harsher. That is, that Mr ND deliberately underestimated the costs to encourage the group to embark upon a course of action from which it would be difficult to extract themselves.

[50] Regardless of the view taken, the outcome was the same.

[51] I incorporate here a significant portion of my decision in LCRO 142/2010. These comments are equally applicable to the present matter.

> [47] An earlier LCRO decision in which estimates are discussed is *Milnathort v Rhayader*, LCRO 140/09. In that decision the LCRO notes that an estimate must be provided with care. At paragraph [14] the LCRO observes when discussing the case of *K M Young Ltd v Cosgrove* [1963] NZLR 967, that "it was noted that the party giving the estimate is the expert in the services to be provided and may be expected to be relied upon by the lay person." At paragraph [15], the LCRO states: "A lawyer who gives an estimate must therefore do so with care. It is not appropriate for a lawyer to give an estimate to a client where the lawyer knows (or ought reasonably to know) that it is likely that the fee will be greater than the estimate in the client's particular circumstances. An estimate should be the amount which work of the nature contemplated in the particular circumstances of the client is likely to cost."
>
> [48] Again, at paragraph [16] the LCRO states: "It is also relevant that a client will rely on an estimate in retaining a lawyer and it often will not be feasible to cease instructing a lawyer if the estimate increases. A client must be able to reasonably rely on an estimate provided."
>
> [49] This statement is reinforced by the statement made in the case of *Kirk v Vallant Hooker & Partners [2000] 2 NZLR 156* para 49, where the Judge states: "Clients reasonably can expect that they can place faith in estimates..."
>
> [50] The requirement for a client to be able to rely upon estimates was also discussed in a decision of the Queen's Bench (*Wong v Vizards* [1997] [2] Costs LR 46). A number of comments made in that decision are relevant.
>
> [51] At page 49, Toulson J states:
>
> > In considering whether a reasonable amount for the work done should exceed what the fee-payer had been led to believe was a worst case assessment, regard should be had to any explanation for divergence. In

> this case, it has not been suggested that there was any unexpected development between November 1993 and the date of the trial. No satisfactory explanation has been given why the solicitors should be entitled to profit costs exceeding the amount put forward to Mr Wong as their worst case assessment, especially when the trial for which they had allowed ten days was completed in less than eight days.

[52] The Judge goes on to say:

> The question is whether it is reasonable that Mr Wong should have to pay more than twice what he had been led to expect on a worst case basis, without any explanation as to why there should have been such a disparity. I do not think that it is.

[53] He then notes that:

> Mr Wong has just cause for complaint if, after seeking a reliable estimate from his solicitors as to his potential costs exposure before deciding to take the matter to trial, he should then be required to pay a far greater amount without further warning or a proper explanation for the difference.

[54] The Judge then refers to the 'Law Society's Guide to the Professional Conduct of Solicitors', 7th Edition, at paragraph 13.07, which states that:

> When confirming clients' instructions in writing the solicitor should:
>
> …(iii) confirm oral estimates – the final amount payable should not vary substantially from the estimate unless clients have been informed of the changed circumstances in writing.

[55] A statement to similar effect was provided in the New Zealand Law Society publication 'Property Transactions: Practice Guidelines' which contained guidelines for costing prior to the Client Care Rules. At paragraph 7.2(b) the Guidelines provided that:

> It is generally inappropriate to charge a fee in excess of an estimate given to a client. You should advise your client in writing immediately if it becomes apparent that the original estimate is likely to be exceeded. Give reasons for the increase and revised estimate figures.

[56] These guidelines are as relevant today as they were then.

…

[58] It needs to be considered what the consequences of this cost overrun should be. McGechan J at paragraph [44] in *Kirk v Vallant Hooker & Partners* decision stated that:

> Bluntly, on the question of over-runs beyond estimate, the appellant was given Hobson's Choice. That is not a choice which should prove conclusive against him.
>
> …

[61] In all the circumstances, I come to the view that it is unreasonable that the Applicant alone should carry all of the consequences arising from this set of circumstances.

…

[52] The difference between the facts in LCRO 142/2010 and the present case is that in that case the lawyer proceeded to complete the retainer and was completely successful. In the present instance, Ms MC and her group were left with no option but to terminate the retainer and proceed as best they could on their own.

[53] If they had been told when they initially approached OP Lawyers that a realistic estimate was $20,000 with a strong likelihood that costs would exceed that, I suspect they would not have engaged the firm. They certainly would not have engaged the firm to negotiate with Council – they had already engaged in that process themselves. In support of this, I note that at one stage Ms MC instructed Mr ND that they wanted their funds spent on the litigation, not on negotiation.

[54] The Standards Committee adopted the view that Mr ND had provided significant legal support at reduced rates to get to the position he did and concluded there had been no loss by the group. That does not take account of the option that they may not have embarked at all on the process and therefore not expended the sum of $20,000. That is a realistic possibility and must be taken into account.

[55] In LCRO 142/2010 I came to the view that it was unreasonable for the applicant to carry all of the consequences of the inadequate estimate and determined that the consequences should be shared equally between the parties. Applying this principle the outcome is that an order will be made that OP Lawyers repay the sum of $10,000 to Ms MC and her co-lessees.

[56] I have not analysed the bills of costs rendered by the firm, which included Mr PA's fees. Accordingly therefore, this order is made both in terms of s 156(1)(e) of the Lawyers and Conveyancers Act 2006 against Mr ND to reduce his fees to effect that refund, and if necessary, in terms of s 156(1)(d) by way of compensation if the firm's fees did not reach the sum of $10,000.

[57] I have noted that OP Lawyers have submitted that any order should be made against the firm and the practical effect of this order is that the firm will be required to refund that amount to Ms MC and the group she represents.

[58] Ms MC will need to supply OP Lawyers with a bank account into which the payments can be made.

**Publication**

[59] In the review application Ms MC seeks publication of the Standards Committee determination on the basis that "public accountability would act as a desirable deterrent for all lawyers."[9]

[60] This decision will be published in an anonymised format on this Office's website. It, or a summary, may also be published by the New Zealand Law Society in its weekly publication LawTalk. However I do not intend to make any orders to that effect.

[61] I have referred to previous decisions of this Office and judgments of the Courts which discuss the requirement for reliability of estimates. The issues have been aired in a number of forums and Mr ND and OP Lawyers will learn from the matters raised in this complaint.

[62] I have not found any conscious or positive intent to lure Ms MC into litigation. I also recognise that it was not Mr ND's misunderstanding that ultimately led to the group withdrawing their instructions but that of Mr PA, although Mr ND accepted responsibility for not drawing the matter to Mr PA's attention. However, Ms MC's statements that $20,000 represented the group's total budget were communicated directly to Mr PA and it was his misunderstanding or lack of recall that resulted in the group not being represented at the High Court hearing.

[63] For these reasons, I think it would be unduly harsh to publish Mr ND's name or any details which would lead to him being identified. There will therefore be no publication order as sought by Ms MC.

**Decision**

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee is confirmed, but modified in the following way:

> Pursuant to s 156(1)(e) Mr ND is to reduce his fees by the sum of $10,000 and pay that sum to Ms MC on behalf of the group she represents; and/or

[9] MC's review application.

If the fees rendered by OP Lawyers did not exceed $10,000 then Mr ND is to pay an amount pursuant to s 156(1)(d) by way of compensation so that the total sum of $10,000 is paid to Ms MC on behalf of the group she represents.

**DATED** this 13th day of October 2014

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O W J Vaughan
**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 MC and Ors as the Applicants
Mr ND as the Respondent
The [City] Standards Committee
The New Zealand Law Society