

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

NV

Applicant

AND

GW

Respondent

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

DECISION

Introduction

[1] Ms NV 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 Ms GW.

Background

[2] Ms NV and her husband separated in 2013.

[3] In July 2015, Ms NV instructed Ms GW to represent her in regard to matters concerning a trust that managed a substantial proportion of her and her husband's assets. Ms NV and her husband were trustees of the trust when the trust was established.

[4] Ms GW was not instructed at the commencement of the dispute. Ms NV had been represented by another lawyer before instructing Ms GW. Ms NV had become dissatisfied with the representation that lawyer had provided.

[5] There were Court proceedings on foot at the time Ms GW was instructed.

[6] It appears to have been the case that the parties over a period had been unable to reach agreement on a number of issues. What was a difficult situation was exacerbated by the fact that the parties' assets in significant part were managed under the umbrella of the trust, and Mr and Ms NV could not agree as to how the trust assets would be dispersed, in order to achieve a final settlement of their relationship property matters.

[7] The assets of the trust included a family home, a company that owned a commercial property and a majority shareholding in a business (Z & Z).

[8] In 2014, both trustees were removed by order of the Court, and an independent trustee appointed.¹

[9] Ms NV's first counsel had filed proceedings in the Court against the trustee, pleading a breach of trust by the appointed trustee.

[10] Ms NV had also commenced bankruptcy proceedings against Mr NV.

[11] Application was made to the Court by the trustee, seeking directions.

[12] The parties agreed to put the issues in dispute concerning the trust to mediation.

[13] The mediation proceeded on 2 November 2015 and continued the following day.

[14] A settlement agreement was drawn up by the parties' counsel at the conclusion of the mediation and signed off by the parties.

[15] Ms NV was unhappy with the outcome. She considered that the agreement reached was unsatisfactory and that it had failed to achieve a fair result for herself and her son.

The complaint and the Standards Committee decision

[16] Ms NV lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 12 March 2016. The complaint filed was comprehensive. Ms NV's complaint provided a detailed account of the background to the trust dispute, a history

¹ NV v NV [201X] NZHC XXXX.

of the Court proceedings and her view of the circumstances which had contributed, in her view, to an unsatisfactory outcome at mediation.

[17] The substance of the complaints that can be gleaned, from the detailed background provided, is Ms NV makes complaint that:

- (a) The agreement reached left her and her son in a precarious position.
- (b) Ms GW had failed to adequately protect her interests.
- (c) The agreement failed to reflect the instructions that Ms NV had provided to Ms GW.
- (d) Ms GW had, in the course of the mediation, endeavoured to persuade her to accept a settlement figure significantly lower to that which Ms NV was willing to accept.
- (e) At the conclusion of the settlement, her financial position was more precarious than it had been prior to instructing Ms GW.
- (f) Ms GW had failed to protect her interests in regard to seeking costs from the Court on the bankruptcy application.
- (g) Fees charged were excessive and outside the estimates provided by Ms GW.
- (h) Ms GW's billing practices were difficult to follow and the accounts rendered contained information that was contradictory.
- (i) Ms GW was not receptive to discussing concerns raised by Ms NV about the accounts.
- (j) Ms GW had achieved little which could justify her fee of \$49,220.64.

[18] A summary of Ms NV's position, is provided by her where she states that:²

In summary, it would appear that although armed with sufficient knowledge and background of the issues at hand as well as what I believed to be a clear understanding as to my position and desired outcome as to a resolution of matters Ms GW seemed to falter at the last and crucially most imperative hurdle being her representation and negotiation of the resulting settlement agreement as my advocate at the mediation on 2 and 3 November 2015.

[19] In providing response to the complaint, Ms GW submitted that:

² Letter NV to Complaints Service (15 March 2016) at 10.

- (a) She had been instructed by Ms NV only and not on behalf of her son.
- (b) Her initial instructions were to review matters relating to the trust.
- (c) Those instructions morphed over a period of time to embrace a variety of other matters.
- (d) Fee issues were raised with Ms NV from time to time.
- (e) At no point did Ms NV query the fee estimates provided.
- (f) Invoices were provided regularly.
- (g) Ms NV raised no concerns regarding invoices rendered, until after the mediation.
- (h) Concerns regarding the amount of time being expended on the file were raised with Ms NV.
- (i) The progressing of Ms NV's case changed significantly from the point at which she was instructed, due in part to the actions of Mr NV and the trustee, and in part to Ms NV providing fresh instructions as matters progressed.
- (j) Shortly after being instructed in respect to trust matters, she was instructed to act in the bankruptcy matter.
- (k) Ms NV's account of the process by which the mediation agreement was arrived at was incorrect.
- (l) The scope of the mediation was discussed and agreed with Ms NV prior to the mediation.
- (m) The matters to be traversed at the mediation conference were discussed in a pre-mediation telephone conference which was attended by Ms NV.
- (n) It was not possible to achieve a global settlement at mediation.
- (o) Ms NV's rights regarding the sale of the business were reserved by the settlement agreement.
- (p) Ms NV's efforts to purchase the business had been compromised by the fact that the trading relationship with the business's main supplier was held exclusively by Mr NV.

- (q) She had not attempted to persuade Ms NV to accept a global settlement of \$810,000 during the mediation.
- (r) The Court's approach to costs in respect of the bankruptcy application was a matter for the Court and not a matter that could be influenced by Ms GW.
- (s) She had not been opposed to meeting with Ms NV to discuss complaint regarding fees, but rather had required that Ms NV clarify the invoices which were in dispute.
- (t) Ms NV had significant litigation experience and it was inconceivable that she was not aware of the costs she had agreed to meet or how those costs were made up.
- (u) Ms NV was a highly demanding and time-consuming client.
- (v) Instructions were carried out competently and professionally.

[20] The Standards Committee distilled the issues to be considered as follows:

- (a) Did Ms GW act in the best interests of Ms NV and her son?
- (b) Were Ms GW's costs fair and reasonable?

[21] The Standards Committee delivered its decision on 2 February 2017.

[22] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

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

- (a) Ms GW had acted appropriately in the mediation.
- (b) There was no evidence to suggest that Ms GW had exerted any pressure on Ms NV to enter into the settlement agreement.
- (c) The decision to enter into the settlement agreement was Ms NV's alone.
- (d) The agreement reached at mediation ensured a significant financial benefit to Ms NV.

- (e) Ms GW had at all times during her representation of Ms NV, acted competently and in her best interests.
- (f) It considered that the costs assessor had completed a comprehensive assessment of the fees and was confident in adopting the assessor's recommendation, that the reasonable fee factors had been properly addressed.
- (g) There was no evidence to substantiate Ms NV's suggestion that Ms GW had provided an initial estimate.
- (h) Whilst the Committee did not consider it possible to address every aspect of Ms NV's complaints in its decision, it had nevertheless, considered all of the numerous allegations, including those ancillary to, or otherwise related to, the principal allegations.

Application for review

[24] Ms NV filed an application for review on 2 February 2017. The outcome sought is a review as to whether Ms GW provided clear and detailed quotes, estimates of costs and invoices in a timely manner and a review as to whether the settlement agreement negotiated on her behalf produced a satisfactory result for her.

[25] She submits that:

- (a) Initial communication from Ms GW advised that her proposed retainer had been kept to a minimum.
- (b) Prior to 31 October 2015 only two invoices had been received from Ms GW.
- (c) On 31 October 2015 three invoices were received from Ms GW however prior to that, no assessment of costs or quotes had been provided by Ms GW other than her initial indication of \$5,750.
- (d) She had been advised by Ms GW on 14 October 2015, that Ms GW would be happy to provide an estimate of costs and to cap those costs so that there was certainty moving forward.
- (e) Ms GW had conceded that her written communications did not regularly reference costs.

- (f) Invoices were not received in a timely manner in order to allow opportunity for her to ascertain the level at which the fees were accruing.
- (g) She proceeded with instructing Ms GW on the basis that there was a fixed fee or quote for work relating to trust matters, but accepted that work engaged in respect to the bankruptcy application would likely incur additional fees.
- (h) During the course of the retainer, there were multiple occasions when she had lengthy discussions with Ms GW which occurred whilst Ms GW was travelling. She did not anticipate that she would be charged for what she considered to be essentially informal chats.
- (i) Ms GW failed, at the mediation, to table key issues that she had herself identified in a statement of issues.
- (j) She had received little benefit from the mediated outcome.

[26] Ms GW was invited to comment on Ms NV's review application.

[27] She submits that:

- (a) The Standards Committee had issued a comprehensive and considered decision.
- (b) Ms NV was attempting, in her review application, to re-traverse her original allegations and to raise further matters.
- (c) The costs issues had been comprehensively addressed in the costs assessor's report.
- (d) Ms NV had not been charged for conversations that had taken place whilst Ms GW was travelling between [City] and a home she maintains in [suburb].
- (e) Ms NV had reviewed and approved the mediation statement which was circulated before the mediation and which was appropriately referenced at mediation.
- (f) Instructions had been carried out competently, professionally and at a fair and reasonable cost.

Hearing

[28] A hearing attended by both parties was convened on 15 May 2017.

[29] In significant part, the submissions advanced by both parties at that hearing, amplified on the comprehensive submissions both had filed both before the Committee and this Office.

Nature and scope of review

[30] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:³

... 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.

[31] More recently, the High Court has described a review by this Office in the following way:⁴

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.

[32] 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

³ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

⁴ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

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

Analysis

[33] The issues to be considered on review can be distilled to the following:

- (a) Did Ms GW provide competent representation?
- (b) Had Ms GW provided a firm estimate of her anticipated fees?
- (c) Were the fees charged fair and reasonable?

Did Ms GW provide competent representation?

[34] Whilst the issue as to whether Ms GW had provided competent representation was squarely put before the Committee, Ms NV does not address that issue directly on review (she does not specifically state in her application that she seeks to review the Committee's decision in respect to the competency argument) but rather she appears to address the issue in peripheral fashion by making request for this Office to complete an analysis as to "whether the settlement agreement negotiated on my behalf is deemed a satisfactory result".⁵

[35] She contends that Ms GW failed to provide her with robust representation at the mediation conference, and that her failure to do so resulted in an agreement which did not protect her interests and which had significantly adverse financial consequence for her.

[36] In making request of this Office to review the mediation agreement, Ms NV is in essence asking the Legal Complaints Review Officer (LCRO) to cast itself into the role of a de facto court and to assess whether the agreement recorded in the memorandum, represented a "satisfactory" result for her.

[37] This Office is not equipped, nor is its role, to carry out the task of determining whether an agreement reached at a mediation conference compromised a party's ability to achieve a fair and equitable outcome in a relationship property dispute.

[38] In arguing that Ms GW failed to represent her competently at the mediation conference and by suggesting that, as a consequence of being inadequately represented, she suffered substantial loss as a consequence of that failure, Ms NV is raising the spectre of a negligence claim.

⁵ Application for review, Part 8.

[39] Negligence involves a duty of care, a breach of that duty and some loss that has been caused by the breach of duty. The proper place in which to air such an allegation is the court. In that forum there is opportunity for claims of and defences to negligence to be tested by evidence and measured against previous decisions where principles have been laid down.

[40] A Standards Committee may however consider whether services provided by a lawyer have met an acceptable level of competency.

[41] A Standards Committee may determine that there has been unsatisfactory conduct on the part of a lawyer which is defined in s 12(a) of the Act as being 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.

[42] To the extent that Ms NV alleges that Ms GW failed to deal with her matters in a competent fashion, she focuses primarily on Ms GW's representation of her at the mediation conference.

[43] Ms GW was instructed in July 2015. The conference took place in November 2015. It is not contested that a considerable amount of work had been done by Ms GW prior to the conference. Nor is it in dispute that Ms NV was a client who, as she was entitled to, was heavily involved in the various proceedings. This was not a case where a client sat back and left the management of their file to their lawyer. The costs assessor who had, in the course of conducting the costs assessment, scrutinised the exchanges between Ms GW and Ms NV and who had met with Ms NV, describes her in his report as "clearly an intelligent and thorough individual who pays close attention to detail". He noted that "it is apparent from the file that Mrs NV worked on the matter into the night and was often corresponding with Mrs GW well outside usual work hours".⁶

[44] There is no evidence of Ms NV raising concerns about Ms GW's representation prior to the mediation conference. She says that prior to the mediation, she felt that:⁷

Ms GW had a strong grasp of the issues in play and my expectation as to the objectives and desired outcomes in terms of a distribution from the Trust's Assets and importantly that it would be desirable for all parties to avoid the necessity to proceed with the Directions hearing which was scheduled for the following week ...

[45] Whilst the costs assessor quite properly did not allow himself to be drawn into the debate as to whether Ms GW performed competently at the mediation, after

⁶ Costs assessor's report, 2 November 2016, at 5 and 7.

⁷ Above n 1, at 5–6.

comprehensively reviewing Ms GW's files, he comments favourably on the work done and specifically notes that:⁸

The work done for the mediation appeared detailed and comprehensive. In my view, it would not have been possible to do such work unless the author had a thorough understanding of the factual matrix involved and the legal principles that apply.

[46] That view is consistent with Ms NV's impression that Ms GW was well prepared for the mediation.

[47] It presents as unlikely that this degree of preparedness would be compromised by a lack of attentiveness or care on Ms GW's part, when the matters got to their critical point.

[48] I have carefully considered all of the criticisms made by Ms NV. In large part, her complaint is driven by concern that the conference failed, in her view, to deliver her a fair settlement. To the extent that she identifies Ms GW as being responsible for what she perceived to be an unsatisfactory outcome, Ms NV says that Ms GW:

- (a) Failed to negotiate a distribution of trust funds to herself or to her son.
- (b) Failed to address issues that had been discussed prior to the conference.
- (c) Failed to discuss the proposed settlement agreement with her.
- (d) Failed to broker a distribution of trust funds.
- (e) Had endeavoured to persuade her to accept a "global" settlement that was less than that to which she was entitled.
- (f) Failed to ensure that the settlement achieved an outcome which did not necessitate her becoming engaged in further litigation to advance her position.

[49] As noted at [36] above, it is not the role of this Office to attempt to dissect from a concluded settlement agreement, an appraisal of the overall fairness of an agreement reached.

⁸ At 9.

[50] But indication as to the instructions provided to Ms GW and of the outcome that was hoped to be achieved, is found in the statement of position prepared by Ms GW prior to the mediation.

[51] It is clear from that statement that it was not anticipated that a final settlement of all relationship property matters was likely to be achieved. Ms GW notes at the conclusion of her memorandum that:⁹

Achieving and [sic] overall settlement of property seems unlikely given uncertain factors, such as the reckless trading proceedings. However, if the parties are able to reach agreement that the Prince & Princess business should be sold at fair value and who the purchaser should be, resolution of matters such that the directions hearing does not need to proceed is plausible.

[52] This is indicative of the parties being aware prior to the mediation that it presented as unlikely that all issues would be settled at mediation.

[53] The agreement reached at mediation:

- (a) Confirmed that Ms NV's husband would purchase the business.
- (b) Directed that responsibility for sale of the family home would be placed in the hands of the independent trustee.
- (c) Provided for an apportionment of settlement funds.
- (d) Settled the issue of occupation rent.
- (e) Discontinued the proceedings brought against the trustee.
- (f) Discontinued the proceedings brought by the trustee.

[54] Considered in its totality, the agreement, whilst bringing some of the outstanding issues to an end, did not, as Ms GW had indicated, settle all issues.

[55] Significantly, the agreement reserved Ms NV's rights in relation to the sale of the business.

[56] Whilst it is understood that Ms NV, having had opportunity to reflect on the agreement, had reservations as to whether the agreement had represented a "fair" result for her, it is difficult to see precisely how her objections with the outcome arrived at can be fairly sheeted home to Ms GW on the back of allegation that Ms GW failed to provide competent representation.

⁹ Without prejudice mediation statement, 1 October 2015 at [23].

[57] Settlement of the outstanding litigation was an objective which was achieved. There was urgent need to sell the home and steps were put in place to achieve that. Agreement had been reached that Mr NV would purchase the business, but that did not compromise Ms NV's ability to challenge any elements of the sale, including issues of valuation and liability.

[58] Whilst the agreement reached at mediation did not settle the relationship property issues, it appears to be the case that the focus for the mediation was on endeavouring to bring an end to the trust litigation and to providing a way forward to ensure that the sale of the home and business could proceed. As Ms GW had noted in her advice to Ms NV prior to the mediation, it was not anticipated that the mediation would resolve all of the relationship property issues.

[59] Ms NV argues that Ms GW did not take time, during the course of the mediation, to discuss the terms of the agreement with her. This to suggest that she did not fully understand what she was agreeing to.

[60] Ms GW rejects suggestion that she failed to adequately explain the terms of the agreement. She says that the mediation took place over a day and a half and that an initial agreement was amended and reviewed by all the parties a number of times.

[61] She rejects suggestion that she endeavoured to persuade Ms NV to accept a global settlement.

[62] I am unable, on the evidence before me, to resolve the differences in the parties' recollections, but it would present as surprising for a lawyer of Ms GW's experience, to neglect to discuss with her client (and to ensure her client fully understood) any agreement that had consequence of committing her client to a binding position.

[63] Nor do I think it likely that Ms NV failed to fully understand the implications of the agreement reached. She was a sophisticated client, experienced in business matters and a client who was familiar with legal process. She had proven herself throughout the course of the retainer to be meticulous and attentive to the details of her case.

[64] She had the option to accept or reject the proposed settlement. I accept that Ms NV when she reflected on the agreement, felt dissatisfied with it, but I am not persuaded that this dissatisfaction can fairly or properly translate into allegation that she was poorly advised by Ms GW, or that Ms GW failed to protect her interests. The agreement reached addressed a number of the issues identified in the pre-mediation

memorandum. I do not consider it likely that Ms NV would not have fully appreciated and understood the implications of the agreement and understood that she was free to reject it if she chose to do so.

[65] I agree with the Committee that Ms GW acted competently.

Fees

[66] As noted, Ms NV's review application focused primarily on the issue of fees. The fees charged related to three distinct (but interrelated) matters, a summary of which is provided below:

The Litigation Review

Invoice no.	Date	Amount
255	31 July 2015	\$5,000
297	31 August 2015	\$5,000
330	1 October 2015	\$10,105
397	31 October 2015	\$3,000
444	30 November 2015	\$1,040
Total		\$24,145

Bankruptcy

Invoice no.	Date	Amount
296	1 September 2015	\$3,000
395	31 October 2015	\$600
Total		\$3,600

Application for Directions

Invoice no.	Date	Amount
396	31 October 2015	\$4,000
399	10 November 2015	\$8,600
Total		\$12,600

[67] She raises a number of matters. She submits that Ms GW had, at the commencement of the retainer, provided her with an estimate in the sum of \$5,750. She accepts that the retainer evolved and that the work completed in respect to the bankruptcy matters was additional to what had been initially contemplated, but she argues that the substantial amount of the work completed by Ms GW, including work arising from the mediation, was intended to be incorporated within what she considered to be a firm and binding estimate provided by Ms GW at commencement.

[68] She raised concerns that Ms GW may have charged for telephone attendances that were casual exchanges, rather than formal advice.

[69] She argues that Ms GW failed to provide regular accounts, thus depriving her of opportunity to raise objection to the fees, and denying her opportunity to make a measured assessment as to what further steps she may have elected to have taken.

[70] Ms NV also raised issues concerning what can best be described as administrative issues with Ms GW's accounts including errors with dates and delays in dispatching.

[71] The significant issues are whether a firm estimate was provided at commencement, whether regular accounts were provided and whether the fees charged were fair and reasonable.

Was a firm estimate provided at commencement of the retainer?

[72] A lawyer is not obliged to provide a firm estimate of likely fee at the commencement of the retainer, but has an obligation at commencement to ensure that the client is properly informed as to the basis on which fees will be charged and when payment of fees is to be made.¹⁰

[73] If request is made of a lawyer to provide an estimate of fees, the lawyer must do so. If it appears that the estimate is likely to be exceeded, the lawyer must advise their client.¹¹

[74] An estimate is not a firm quote, but when an estimate is provided, there is a strong expectation that the estimate will be adhered to. A quote is a definite indication of expected costs and, once given, a lawyer cannot depart from this, whereas a lawyer may depart from an estimate if the client is informed in advance that this is likely to happen or if the final bill is not materially different from the estimate provided.

[75] In arguing that she was given an initial estimate, Ms NV relies on an email of 27 July 2015 in which Ms GW advised Ms NV as follows:

We have kept our proposed retainer to a minimum as we appreciate that costs are a practical concern to you. If matters are to be settled this will obviously have a significant impact on costs. However, if not, we will prepare an assessment of costs to get this matter to trial.

[76] Whilst I accept that Ms NV may have formed a view that Ms GW's use of the word retainer was intended to convey a commitment to a firm and binding estimate of costs, the email is not couched in language which, if read in conventional terms, gives indication that Ms GW was providing Ms NV with an estimate.

¹⁰ Rule 3.4(a).

¹¹ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.4.

[77] Ms GW does not refer to an estimate; she is signalling that she has endeavoured to set her retainer (essentially, a fees up front requirement) at a figure that recognises the financial pressure that Ms NV was under.

[78] If there was any room for uncertainty as to whether Ms GW was requiring a retainer to be paid in advance, or whether she was providing a firm estimate for the job, any scope for confusion must surely be eliminated by Ms GW's indication that potential costs would be significantly influenced by factors uncertain, specifically whether there was prospect of the matter being settled or whether the matter would need to proceed to trial.

[79] This is not reflective of Ms GW giving firm indication, at commencement, that she was providing a fixed estimate for her fees.

[80] Nor is it disputed by Ms NV that the scope of the work expanded as the matter proceeded. Ms GW, whilst initially focusing on trust issues, was shortly after the retainer commenced, required to address issues relating to the bankruptcy proceedings that had been filed by Ms NV. Further complications arose as a consequence of the trustee's decision to make application to the Court for directions.

[81] Ms NV fairly conceded, at hearing, that she did not have expectation that all of the work subsequently completed by Ms GW would be covered by the initial payment of \$5,795 and refined her argument to focus on argument that Ms GW had failed to provide her with regular invoices.

[82] I am not persuaded that Ms GW provided a firm fee estimate at the commencement of the retainer.

Were accounts provided regularly?

[83] Ms GW says that she frequently discussed fees with Ms NV, that she rendered invoices regularly and that those invoices were fully notated.

[84] Ms NV disputes that she was invoiced regularly. She contends that prior to 31 October 2015, she had only received two invoices from Ms GW.

[85] This issue became the main focus of the hearing.

[86] Ms NV says that she did not receive invoice 255 (said by Ms GW to have been rendered on 31 July 2015 in the sum of \$5,750 GST inclusive) until March 2016. She says that she did not receive invoice 330 (rendered on 1 October 2015 in the sum of \$11,637.75 GST inclusive) until March 2016.

[87] Ms NV contends that the consequence of failing to receive these invoices promptly was to continue to encourage her in the belief that the fees paid to Ms GW, at commencement, were intended to cover all the costs involved in addressing the trust issues. She does not dispute that she is obliged to meet costs of additional work, but says that if she had been made fully aware of the extent of her fees, it would have been unlikely that she would have travelled the path that she did. She goes so far as to suggest that she would have likely halted matters.

[88] Ms GW rejects suggestion that invoices were not regularly provided. She says it was her practise to invoice regularly. It is her firm view that all invoices were provided to Ms NV soon after the invoices had been compiled.

[89] Dispute as to whether an invoice was or was not rendered on a particular day should, in the normal course of events, be capable of being easily settled by reference to the lawyer's correspondence, that is, by reference to the date of the correspondence which enclosed the account.

[90] Ms GW advises that during the period of the retainer, she was in the process of moving to a "paperless office" and was trialling a system whereby all her clients received their accounts by email, with no hard copy of the email correspondence being made.

[91] Regrettably, she has no email record of the date that the two disputed invoices were dispatched. She says that the management of these administrative matters were in the hands of a staff member who has now left Ms GW's employ. For reasons of which I am uncertain, Ms GW is apparently unable to access her former employee's email account to secure confirmation of the dates the invoices were sent.

[92] Both Ms NV and Ms GW presented their evidence in the course of the hearing in a manner which I considered to be honest and credible.

[93] I am satisfied that there were problems with some aspects of Ms GW's office's administration. Ms GW accepts that there were mistakes made in administering Ms NV's file, but none, she argues, of such import as to significantly compromise her billing processes.

[94] It is not contested that Ms GW's management of the file throughout, was for the most part, conducted in a capable and competent manner.

[95] Ms NV conceded that to be the case. The focus of her criticism was directed at how Ms GW had managed the case at the mediation hearing.

[96] It presents as surprising that Ms GW, in the face of what appears to have been very competent and attentive management of the file, would not have brought that degree of competency to the management of her own accounts.

[97] Her letter of engagement recorded that she would provide regular accounts, and, whilst I accept that Ms NV says that two of the accounts were not dispatched to her at the date recorded on the invoices, I think it probable that the invoices were prepared approximate to the date recorded on those invoices.

[98] At hearing, considerable attention was focused on two invoices that Ms NV contends she did not receive on the dates recorded in the accounts.

[99] Ms NV's argument that she was not sufficiently informed as to the state of her fees and her argument that she would not have proceeded with the litigation in the manner she did, rests on allegation that these invoices were not received on the dates they were said to have been sent.

[100] These complaints are made from a context of Ms GW conceding that there had been problems with some of Ms NV's invoices (failure to add GST to one of the accounts) and her acceptance that she was unable to access the correspondence which would have accompanied the two accounts as a consequence of an inability to access her former employee's email account.

[101] Whilst making those concessions, Ms GW nevertheless emphasised that it was her firm view that the two invoices which Ms NV argues had not been sent to her until late in the piece, would have been dispatched around the date recorded in the invoice.

[102] To support her position, she submits that:

- (a) It would present as illogical for invoices to be prepared and not sent.
- (b) Ms NV was a highly engaged client who had a good understanding of the work that was being done.
- (c) The work reflected in the two invoices was specific, and it would present as incomprehensible that Ms NV did not both understand that the work which was comprised in the two invoices had been completed and that she would be invoiced for that work.

- (d) At the commencement of the retainer, Ms NV had made regular payments to the accounts. This would evidence that Ms NV was well aware that invoices had been rendered.

[103] To support argument that she had not received invoices in a timely fashion, Ms NV places considerable reliance on a copy of an email correspondence she had received from Ms NV dated 1 September 2015.

[104] She produced at hearing a copy of that email. She had printed that email out and notated the correspondence with handwritten notes that confirmed the documents she said she had received in the attachments to the email.

[105] Ms GW's email recorded the following attachments as having been forwarded:

- (a) invoice 31 July 2015;
- (b) invoice 31 August 2015;
- (c) letter to you 1 September 2015;
- (d) statement 1 September 2015;
- (e) invoice 31 August 2015;
- (f) invoice [Mr Y].

[106] It is noted that the invoice dated 31 July 2015, is one of the invoices that Ms NV says that she did not receive until March 2016. A failure to receive this invoice in a timely fashion is pivotal to her argument that she was not informed as to the escalating costs.

[107] Ms NV says that, whilst the email records that the invoice of 31 July 2015 was forwarded to her, she did not actually receive that invoice. The invoice that was recorded as having been sent under the notation 31 July 2015, she says was in fact invoice 297, an invoice rendered in the sum of \$4,996.75 (a transparent error as the fee charged was in the sum of \$5,000 and the account rendered failed to record the GST component of \$651.70 having been charged).

[108] That was not the only problem with invoice numbered 297. Ms NV says that she received a second invoice under number 297, this also rendered in the sum of \$4,996.75 (GST inclusive). She provides copies of the two invoices numbered 297.

[109] Ms GW concedes that mistakes were made with invoice 297, but argues that the mistakes, when identified, were quickly remedied.

[110] Together with the invoices forwarded on 1 September 2015, Ms GW forwarded a statement to Ms NV.

[111] In her written notations, Ms NV confirms receipt of the statement at 10.30 pm on 1 September 2015, the date and time that Ms GW's computer records the email as having been sent.

[112] The statement, described under the description, "Trust Litigation Review" records:

- (a) Funds received on account of costs in the sum of \$5,750.
- (b) Invoice 255 rendered in the sum of \$5,750.
- (c) Invoice 297 rendered in the sum of \$4,996.75

[113] The statement perpetuates the error for invoice 297, that error apparently having arisen as a consequence of the GST component of the fee of \$5,000 being deducted from the fee instead of being added, to result in a fee charged of \$4,996.75. This was an error that I consider would have been immediately apparent to Ms NV.

[114] But turning to the issue of critical concern for Ms NV (failure to receive invoice 255) the statement provided makes clear reference to the 255 invoice.

[115] The significance of the statement is that it records Ms NV having been charged a fee of \$5,750 under invoice number 255, an invoice that Ms NV contends that she did not become aware of until March 2016.

[116] It clearly was the case that the reference to invoice 255 was not overlooked by Ms NV. In her handwritten notes she records that she had summarised the statement and it is evident from that summary that she had noted the description of the accounts and their amounts that had been noted in the statement.

[117] Whilst I accept that Ms NV says that the attachment which recorded the invoice of 31 July 2015 that was sent, was not the invoice that was rendered on that date, her evidence is not sufficient in itself to establish with certainty as to whether the invoice was incorrectly described in the attachment.

[118] Ms GW would argue that the invoice she sent on 1 September 2015, which included amongst the attachments the invoice dated 31 July 2015, accurately recorded

that Ms NV had been provided with a copy of invoice 255 early in the piece, and provides a total defence to argument that Ms NV did not receive that invoice until March 2016.

[119] Ms NV's handwritten notes do not, in themselves, conclusively establish which invoices were forwarded. She records, and I do not dispute, in good faith what her recollection was of the attachments that had been opened in September 2015, but short of a forensic examination of the email trail, I cannot be absolutely certain as to which emails were opened on a particular date.

[120] It is noted that during the course of the retainer Ms NV had on occasions apparently experienced problems with her computer, a factor which Ms GW suggests may have had some impact on her not having received material that Ms GW suggests had been forwarded to her.

[121] Ms NV also raised concerns about invoice 330, arguing that this invoice, purportedly raised in October 2015, had not been received until March 2016.

[122] I do not conclude, having considered the work that this invoice covered, and taking into account that the invoice was raised late in the piece, that Ms NV would have been surprised by the invoice. Nor is it possible on the evidence available, to draw emphatic conclusion that Ms NV did not receive the invoice on the date that Ms GW says it was dispatched.

[123] Having carefully considered all the material before me, I am not persuaded that errors in forwarding accounts (even if established) compromised Ms NV to the extent that she argues for.

[124] To a degree, Ms NV's argument that a failure to receive regular invoices compromised her ability to make decisions, as to whether to proceed with the litigation, is inextricably linked to her argument that she had expectation that the litigation would be carried out for a set fee.

[125] Ms NV suggested at hearing that she would have brought proceedings to a halt if she had been fully informed as to the position with her fees.

[126] With every respect to Ms NV, I do not accept that argument and consider it improbable that matters would have been brought to a close if all accounts had been provided in the timeframe suggested by Ms GW, that is, approximate to the date recorded on her invoices.

[127] Asked at hearing to clarify, in view of the litigious history of the proceedings, as to what steps she would have taken (accepting for sake of argument that she was not properly informed about the state of her fees) if she had been fully informed, Ms NV suggested that she may have adopted a different approach to the mediation option. I am not persuaded by this argument.

[128] At the time Ms GW was engaged, the litigation was being fought on several fronts and the mediation option, likely presented to both parties as an option that it was both sensible and appropriate for them to pursue.

[129] Whilst not elaborating on what has happened (and she was not asked to) with the litigation subsequent to the termination of Ms GW's retainer, it was apparent from Ms NV's discussion of the billing practices adopted by her new lawyer, that the issues, regrettably, continue to be litigated.

[130] I am not persuaded that it presents as likely, that Ms NV was not aware of the extent to which her fees were accruing.

[131] She was a sophisticated and capable client, who had a sound and comprehensive understanding of the issues involved in the various tranches of the litigation.

[132] She was intensely involved in discussions with Ms GW on all matters relating to the various proceedings.

[133] While she argues that she laboured under the impression that she had received a "fixed quote", the work on matters relating to the trust, the disputed trust matters were clearly of most importance, and it would have been apparent to Ms NV, through her regular engagement with Ms GW, that most of the work was being spent on the trust issues.

[134] Ms GW's letter of engagement records that fees would be charged on a time cost basis and notes the hourly rate for the practitioners who would be working on her file.

[135] She would have been aware of the work involved in Ms GW having to familiarise herself with the issues, when the file was uplifted from her previous lawyer.

[136] Whilst the costs assessor, understandably, avoided making any conclusive finding as to whether there had been delay in providing some of the accounts, he noted that he was in agreement with Ms GW that if the invoices were produced in a timely

fashion (as Ms GW contends), that it would make no sense for them not to have been promptly sent.

[137] Whilst Ms NV argues that the administration in Ms GW's office was somewhat shambolic, and it is unquestionably the case that there were administrative errors with some of the accounts, suggestion that Ms GW's office procedures were inadequate does not accord with the costs assessor's view of her management of the file in general.

[138] In the course of his report, the assessor notes that:

- (a) There was good keeping of file notes.
- (b) Attendances were documented with hand written file notes.
- (c) There was between Ms GW and Ms NV a "shared view" of the importance of the matter and a constant level of urgency reflected in the correspondence.
- (d) Time records were well notated.
- (e) Files were well organised, chronological and supported by detailed file notes.

[139] It presents as unlikely, considering the careful and well documented management of a complex and extensive file, that Ms GW would neglect to issue regular accounts, as she had indicated she would do at the commencement of the retainer.

[140] I am also confident that Ms NV had a good understanding of the work involved and, in particular, how, as the retainer evolved, the work was being allocated to the different components engaged by the retainer.

Were the fees charged fair and reasonable?

[141] To assist with its consideration as to whether the fees charged were fair and reasonable, the Committee appointed a costs assessor.

[142] Mr KJ was instructed by the Committee to prepare a report.

[143] The report is comprehensive. The steps taken by Mr KJ, in the preparation of the report, thorough. He consulted with both Ms NV and Ms GW to ensure that he had a clear understanding of their respective positions. He corresponded with the parties

and met with both. He sought further responses from them in respect to various issues that he considered required further clarification.

[144] The assessor:

- (a) Considered all the documentation, communications and accounts relating to Ms NV's affairs, a task which engaged the assessor in reviewing some fourteen files.
- (b) Traversed in detail, with Ms NV, the scope of the work done.¹²
- (c) Completed a "line by line" analysis of the time records with the work appearing in the files.
- (d) Cross referenced the accounts to the time records.
- (e) Addressed the fee by reference to each of the Rule 9 criteria.

[145] In determining that the fees charged were fair and reasonable, the assessor concluded that:

- (a) Ms GW was an experienced and senior lawyer, her charge out rate presented as reasonable and consistent with that charged by other practitioners in the field (perhaps slightly lower).
- (b) The matters were legally and factually complex.
- (c) The time records supported the level of fees charged.
- (d) Work completed for the mediation was detailed and comprehensive.
- (e) As a litigator of some twenty years experience, he felt well positioned to comment on the reasonableness of the fees.

[146] I have carefully considered the assessor's report and am not persuaded, having considered the submissions and having had opportunity to hear from Ms NV, that there are grounds to interfere with the assessor's report.

[147] As noted, the report is comprehensive and is particularly distinguished by the obvious care and attention the assessor has paid to assessing the work completed and

¹² I note that this comprehensive approach extended to the assessor traversing directly with Ms NV, specific sections of the Companies Act engaged by the trustee issues.

the time taken to cross reference time records to evidence of the work recorded having been established on a perusal of Ms GW's files.

[148] The assessor is an experienced litigator who brought, to his examination of the accounts, an informed appraisal as to the nature and complexity of the litigation. From that, conclusion was reached that the costs charged represented a fair fee for the work involved.

[149] Importantly, the assessor does not rely exclusively on the time records when considering the fairness and reasonableness of the fee. An examination of time records may provide accurate account of what the job cost, but it does not necessarily follow that the records in themselves provide accurate account of what the job was worth.

[150] The time spent on the file is assessed by careful reference to the work that was done and, importantly, an assessment of the nature and complexity of the work.

[151] I can identify no grounds which persuade me either that the costs assessor has failed to conscientiously address the fees, or that the assessor has overlooked any matter of significance.

[152] Having considered independently, as I am required to do, the nature and extent of the work completed, the complexity of the issues engaged, the experience and skill of the practitioner, the time and labour expended, the time records and with the assistance of a comprehensive assessor's report, I reach conclusion that the fees charged were fair and reasonable.

Conclusion

[153] I see no grounds which could persuade me to depart from the Committee's decision.

Decision

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

DATED this 31st day of July 2017

R Maidment
Legal Complaints Review Officer

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

Ms NV as the Applicant
Ms GW as the Respondent
[Area] Standards Committee[X]
New Zealand Law Society