LCRO 71/2012

CONCERNING	an application for review pursuant to s 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of [A North Island] Standards Committee
BETWEEN	**MR AS** Applicant
AND	**[Company A] (by its Director Mr ZI)** Respondent

DECISION

Introduction

[1] This matter relates to proceedings taken by Mr AS, a lawyer, on behalf of the Respondent,[Company A], to recover debts that [Company A] considered were owed to it. On behalf of [Company A] its director Mr ZI complained to the Law Society on 11 November 2010 about:

a) the practitioner's advice to and representation of Mr ZI whilst he was employed as a staff solicitor by the firm. In general terms this included allegations of acting without instructions, failing to follow instructions, inadequate reporting, discourtesy, negligence and failing to provide documents. Throughout this decision I will refer to these as the conduct issues; and
b) the level of fees charged by the firm were excessive.

Background

[2] [Company A] was in the business of [sentence redacted]. [Company A] instructed Mr AS to assist in recovering monies it alleged were owed by four [entities] controlled by husband and wife principals (the Entities). While there had been an agreement in place relating to the payment of outstanding amounts (which another lawyer in Mr AS's firm had assisted in reaching), this had not been adhered to. Three of those entities were companies; the fourth was a Trust.

[3] [Company A] had been using another lawyer in Mr AS's firm to seek to recover the debt without success. Mr ZI, a shareholder and director of [Company A] met with Mr AS (who is a litigation lawyer) in late June 2009 and provided him with the contract documentation between it and the four entities. Each contract contained a dispute resolution clause (mediation followed by arbitration), although activating the clause was not a mandatory step in the event of a dispute.

[4] Mr ZI says that Mr AS strongly advised [Company A] to issue Notices of Statutory Demand under ss 289 and 290 of the Companies Act 1993, against three of the Entities. Mr ZI asserts that the dispute resolution clause was pointed out to Mr AS, but his strong advice was to issue the statutory demands. Summary judgment proceedings against the Trust were also instituted (it being a Trust and not amenable to the statutory demand procedure). Mr ZI says that Mr AS provided an estimate of $25,000 for all of the litigation. This litigation did not proceed happily.

[5] Two of the three corporate entities applied to the High Court to set aside the statutory demands. Mr ZI says that Mr AS advised [Company A] to defend those applications; during the hearing Mr AS apparently informed Mr ZI that the Court had indicated that those cases should be resolved using the dispute resolution clause in the respective contracts.

[6] The third entity applied to the High Court for an injunction to prevent any advertising of the liquidation proceedings. Mr ZI says that Mr AS advised that the application should be defended as this would demonstrate how serious Mr ZI was

about recovering what was owed by the four entities. Ultimately an injunction was granted, and advertising prevented. Summary judgment proceedings against the fourth entity were adjourned.

[7] The nett result was that all four sets of proceedings were delayed whilst the contractual disputes resolution processes involving arbitration and (it appears by agreement) mediation were undertaken. At the time the complaint was made, Mr ZI was concerned that it may still have to pay costs on the adjourned statutory demand and summary judgment proceedings.

[8] The disputes eventually proceeded to arbitration during May 2010, with Mr AS continuing to represent the Respondent. Mr ZI considers that the practitioner's representation during that process was also inadequate, pointing to the fact that the initial dollar claims against each entity had to be reduced – in one instance from over $500,000 to just over $100,000. Mr ZI describes these adjustments as necessary because of the practitioner's miscalculations. This resulted in additional legal fees.

[9] At some point the arbitral process was paused and mediation was undertaken. There are similar complaints about how this was handled by the practitioner. The recurring complaint about Mr AS with both processes was a lack of communication about what was taking place, or late notice of the next steps. The mediation was also adjourned so that the experts retained by both sides could consult with one another and try to suggest a mutually agreeable resolution. Mr ZI says he was extremely dissatisfied with the arbitral hearing process. He says he was not consulted about the steps to be taken, left out of discussions and was generally unclear about what was taking place at any given time.

[10] The proposals were given to Mr ZI, who expressed dissatisfaction with them. Despite being hospitalised, there was pressure on Mr ZI to provide instructions and agree to certain proposals. Mr ZI says that he was unable to provide the instructions sought, or agree to proposals that were put, because he did not have enough information upon which to base any decision. Reference was made to a memorandum Mr AS had prepared as part of the dispute resolution process, setting out a number of matters, but which he had not given to Mr ZI despite requests to do so.

[11] Mr ZI also considers that Mr AS's communications with the husband and wife belittled them, and that he was aggressive and dismissive. Both also felt that Mr AS was unwilling to listen to them. [Company A] terminated the practitioner's instructions on 22 June 2010 and the complaint was made on 11 November 2010.

Practitioner's response to the complaint

[12] In a lengthy document dated 10 December 2010 Mr AS responded to the complaint. He said that he and Mr ZI agreed that statutory demands should be issued against three of the four entities. Mr AS said that he was aware that the statutory demand procedure was not without its risks, and that he certainly never guaranteed that it would be successful. As it happened, the Entities successfully took steps to halt that procedure. Mr AS said that his instructions from Mr ZI were to oppose these steps: Mr ZI wanted to appear strong and determined.

[13] In November 2009, on the eve of hearings relating to the statutory demands, the lawyers acting for the Entities contacted Mr AS and suggested that the parties refer their dispute to arbitration. Mr AS said that this "was something the (complainant) wanted to hear. It signified a backdown from the previously hardened attitude (of the Entities)".[1]

[14] Indeed Mr AS said that he was able to secure from the Entities a substantial and unconditional bank guarantee in favour of [Company A], to be held pending any arbitral award. Mr AS submits that this result clearly demonstrates the effectiveness of the statutory demand procedure; the Entities were forced to the table to resolve the disputes.

[15] Mr AS also rejects the allegation that he made errors calculating the amounts owed by the Entities, which required amending before the arbitral hearing and at additional cost to [Company A] and asserted that their accounting system was inaccurate and untrustworthy. Mr AS does not agree that he failed to consult with Mr ZI or explain various steps to him in the lead-up to and during the arbitral process itself. He is adamant that he provided Mr ZI with an important expert report prepared in relation to the various [installations], prior to the commencement of the arbitral hearing.

[1] Practitioner's response to the complaint dated 20 December 2010 at pg 7.

[16] Furthermore, Mr AS said that both the director (Mr ZI) and the second shareholder of [Company A] were present when the Arbitrator encouraged the parties to adjourn the hearing, so that expert-led negotiations between the parties could take place. According to Mr AS this was agreed to without objection. The practitioner's observation of Mr ZI and the second shareholder during the arbitral process was that they were calm, friendly, not confused and did not express any dissatisfaction of any kind. Indeed, they participated fully in the expert-led negotiations which commenced on day two of the arbitral hearing.

[17] At the conclusion of the expert-led negotiations, a proposal was put to Mr ZI, which involved remedial work and compensation. Lengthy discussions between the practitioner, the expert and Mr ZI followed, at the conclusion of which Mr ZI was, according to the practitioner, happy with the expert's proposals.

[18] Mr AS describes the entire process – pre-arbitral hearing, the hearing itself and the expert-led negotiations, as well as the follow-up discussion with [Company A]'s expert, as transparent. He does acknowledge being at times "robust" in his approach to the director and other shareholder – this in the context of their strong sense of entitlement to recovery from the Entities, and at the same time turning a blind eye to the weaknesses in [Company A]'s case.

[19] Ultimately Mr AS considers that [Company A] did not achieve its goal of recovering significant monies from the Entities, because of workmanship issues, poor accounting practices and overpayments by one of the Entities. Mr AS said that the litigation and subsequent dispute resolution processes brought those issues to light.

[Company A]'s response to the practitioner

[20] Under cover of a letter dated 28 January 2011, Mr ZI commented on the practitioner's response to the complaint. In general he did not accept the position as stated by Mr AS, maintaining his view that Mr AS did not communicate effectively, and did not explain the arbitral procedure and the subsequent mediation and negotiations. Mr ZI is adamant that Mr AS was unprofessional for a majority of the time he was

acting, and made inappropriate comments. This was drawn to the attention of another principal in the firm, but apparently not acted upon.

Cost revision sub-committee

[21] On 8 March 2011 the Standards Committee delegated certain of its powers and functions to a two-person sub-committee pursuant to s 184(1) of the Lawyers and Conveyancers Act 2006 (the Act), and asked the sub-committee to carry out a cost revision of the invoices rendered to Mr ZI by the firm.

[22] The delegation requested the two costs assessors to (*inter alia*) comment on the fee and whether it is fair and reasonable; if appropriate, specify a fair and reasonable fee; and to comment on "anything else which … might assist the Standards Committee in reaching a properly informed decision about the fee complaint".

[23] Although the sub-committee was asked to only consider the fees complaint, its report is nevertheless of great assistance when considering the conduct issues, as any cost revision will be informed by an examination of conduct issues.

[24] The sub-committee expressed the view that "the decision to proceed to issue statutory demands … was the wrong step to take".[2] The sub-committee identified the following factors to support this view:

- The firm had not raised the possibility of alternative dispute resolution with the Entities' lawyers when matters broke down in April 2009;
- The firm did not provide Mr ZI with an opinion about options, including alternative dispute resolution; and
- Mr AS ignored Mr ZI's reference to the alternative dispute resolution clause in the contract.

[25] The sub-committee reached the view that the position ultimately reached (of engaging in alternative dispute resolution) should have been addressed prior to the issuing of statutory demands and the inference was that the work undertaken in

[2] Sub Committee's report dated 12 August 2011 at [24].

respect of those statutory demands may not have been entirely necessary. Indeed, the sub-committee described it as "astonishing that the statutory demand procedure was used when it was clear that there was a dispute about the quantum".[3] The sub-committee also noted that when assessing a complaint involving a litigation file, it is important to recognise that litigation:[4]

> [M]ay follow different twists and turns as new issues, evidence or opponent's allegations surface, and different aspects require attention. What may have appeared at first to be a proper course of action, may turn out later to be a less effective option for reasons that could not have been reasonably foreseen at the time. … A lawyer is not expected to be a clairvoyant.

[26] As indicated, the sub-committee's brief was to assess the reasonableness of the fees charged by the firm. In doing so, it identified a number of factors to be considered, included amongst which was the results achieved. In considering that criterion, the sub-committee placed the practitioner's actions under a microscope, and ultimately concluded that:[5]

> [T]he strengths and weaknesses of [Company A]'s case were not adequately analysed before the ZIs were committed to this very unfortunate and drawn-out litigation. And … such an analysis could and should have been carried out by [the firm][6] at an early stage.

[27] The sub-committee concluded that the fees charged by the firm were not fair and reasonable for the services provided, and considered that a fee of between $35,000 and $40,000 plus GST was a fair and reasonable charge for the work carried out by Mr AS. The total GST inclusive fees charged by the firm during this period were slightly over $90,000. The crucial factor for the sub-committee was the "results achieved*"* criterion, and as indicated, on this the sub-committee was sharply critical of the practitioner.

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[3] Above n 2 at [37].
[4] Above n 2 at [69].
[5] Above n 2 at [105].
[6] In this part of the sub-committee's report, the firm and the practitioner are referred to interchangeably. Given that the report is intended to be a cost revision, and the fees were rendered by the firm in which the practitioner was an employee, the firm is the correct party to that revision. However it was the actions of the practitioner which were being assessed, as part of an assessment of the reasonableness of the fees charged.

Practitioner's further response to the complaint (including the sub-committee's report)

[28] Mr AS sums up his view of the issues he was asked to give advice about, thus:[7]

> With respect I do not see how this case could be regarded as being otherwise than about the payment of outstanding amounts to (my client), subject to set-offs for deficiencies.

[29] Mr AS reiterated his position that the statutory demand procedure was appropriate notwithstanding any dispute in light of the "no set off" clauses of the relevant contracts and the amount of the claims. He also asserted that it was consistent with the instructions of Mr ZI who was tired of the delays and what was perceived as "deliberate stalling tactics", and felt that "renewed efforts towards a mediated or negotiated settlement did not sit well (with its recent experiences)".[8]

[30] Mr AS noted that no criticism was directed at him by the Court in respect of the use of the statutory demand procedure. He also does not accept that his preparation for and attendances at the arbitral hearing (and subsequent expert-led mediation) were inadequate or that he was at fault when adjustments to the amounts claimed were required as the matter progressed.

[31] In relation to the allegations of discourtesy, rudeness and inadequate reporting Mr AS points to the many exchanges of email between himself and Mr ZI, as well as the time records showing regular telephone and personal attendances. He rejects the allegations of rudeness.

The firm's response to the sub-committee's report

[32] Although the firm's involvement in the complaint and associated cost revision was restricted to the fees and not the conduct issues, comments made by the firm are nevertheless instructive in relation to the conduct issues.

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[7] Practitioner's response to sub-committee report, dated 7 October 2011 at [28].
[8] Letter AS to Subcommittee (8 June 2011) at para 5.

[33] In its response to the sub-committee's report, dated 7 October 2011, the firm corroborates Mr AS's description of the ZI's instructions, in particular that Mr ZI had an "unaltered belief" that [Company A] was and still is owed a substantial amount of money by the Entities – this persisting even after his arbitral claim was struck out by the arbitrator.

[34] The firm provided a short letter from the Arbitrator, which was to the effect that the practitioner's conduct of the arbitral proceedings on behalf of Mr ZI was "at all times … proper and professional" and that the Arbitrator "would have had no criticism of Mr AS with regard to the way the matter was concluded".[9] The Arbitrator described the proceedings as involving "lengthy and complicated documents".

[35] The firm also corroborated Mr AS's description of the instructions; namely that the firm was to take whatever steps it felt were necessary to recover a very substantial sum of money. The firm also believed that the costs complaint was disingenuous, and only initiated after the firm had taken steps to recover unpaid fees.

Mr ZI's responses

[36] In an undated letter to the Lawyers Complaints Service, Mr ZI acknowledges receiving the sub-committee's report and states that it has been placed into liquidation by the Entities, based upon the High Court's costs awards (which related to the interlocutory proceedings in connection with the statutory demands). Mr ZI considers that the statutory demand process directly led to its liquidation. Mr ZI reiterated that it was poorly advised by the firm and Mr AS, and that the statutory demand process should never have been used.

[37] Mr ZI also expresses "alarm" that it was not informed that the Entities' lawyers had, in June 2009, indicated some willingness to negotiate the dispute. Implicit in this is the suggestion that, had Mr ZI known about this, he would have instructed Mr AS to proceed along those lines rather than serving Statutory demands.

[9] Letter Arbitrator to NZLS (15 June 2011).

Standards Committee processes

[38] After receiving the sub-committee's report, the Standards Committee to which the complaint had been referred, and which had made the delegation, considered that there were conflict of interest issues and so the complaint file (including the sub-committee's report) was referred to and ultimately determined by a Standards Committee some considerable distance away.

[39] That Standards Committee had the benefit of the complaint; Mr AS's response to the complaint; [Company A]'s response to the practitioner; the parties' submissions to the sub-committee; the sub-committee's report; the practitioner's, firm's and [Company A]'s responses to the sub-committee's report.

[40] The Standards Committee conducted its hearing on the papers, and although referred only to Mr AS as respondent, the firm was given the opportunity to be heard in respect of the cost revision that had been undertaken by the sub-committee.

Standards Committee's determination

[41] The Standards Committee summarised the various complaint issues as relating to; acting without instructions; discourtesy; failure to follow instructions; inadequate reporting and communication; negligence/incompetence; overcharging and refusal to hand over documents.

[42] The way that the Committee approached the matter indicated that it perceived all complaints, including the alleged overcharging, as essentially arising, and having some relation to, the core complaint which was the decision to issue statutory demands under the Companies Act 1993 as a means of enforcing payment of alleged debts.

[43] The Standards Committee determined that Mr AS had breached Rule 2.3 of the Rules of Conduct and Client Care[10] (the Rules) by issuing Statutory demands against the three entities. It was influenced by four factors:

[10] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

- correspondence from the Entities' lawyers to Mr AS, dated in March and June, asserting that the debts were disputed;
- the commentary to Rule 2.3 of the Rules;[11]
- *Brookers* commentary on s 289 of the Companies Act 1993; and
- the sub-committee's report.

[44] The 'Costs Report' provided to the Standards Committee by the sub-committee dealt with both costs and conduct issues. This report was accepted by the Committee which adopted the content as part of its decision. A copy of that Report was attached to the Committee's decision.

[45] The Standards Committee considered that the two letters from the Entities' lawyers were sufficient to put Mr AS on notice that the claims made by [Company A] were in dispute, such that the statutory demand procedure was not appropriate. The Standards Committee held that Mr AS fundamentally misunderstood "the purpose of a statutory demand and the High Court's jurisdiction to set aside a statutory demand".[12] It dismissed Mr AS's reference to authority supporting his approach, as "academically interesting [though] not relevant to the High Court's jurisdiction over Statutory Demands". The Standards Committee considered that Mr AS's failure to accept his inappropriate use of the statutory demand process was an "aggravating factor in the complaint against him".

[46] Although it made no clear finding of unsatisfactory conduct, the Standards Committee nevertheless censured Mr AS pursuant to s 156(1)(b) of the Act, and ordered a reduction in the fees charged. The only penalty imposed was the censure. There was no discussion in the determination about publication.

Application for review

[47] Mr AS's review application specifically sought removal of the Standards Committee's order of censure. He argued that the Standards Committee had not given sufficient consideration to the authorities which supported the actions he had taken with

[11] Rule 2.3 examples of breaches of the Rule. One such example is "issuing a statutory demand under the Companies Act 1993, knowing that (or failing to make inquiries whether) the debt is bona fide disputed".
[12] Standards Committee determination dated 1 March 2012.

regard to the statutory demands, and submitted that the Committee was wrong to have described them as being of historic or academic interest. With his application Mr AS also attached a copy of the lengthy response (described as a Memorandum) to the Cost Report that he had previously sent to the Standards Committee. In this memorandum he had detailed his reasoning for why he believed that subcommittee's report was wrong, and in a final sentence he submitted that there was a basis and justification for there to be an uplift to the fair and reasonable fee as assessed by the subcommittee.

[48] A copy of the application was sent to [Company A]. Mr ZI provided an extensive response, which addressed many of the paragraphs in Mr AS's Memorandum by reference to the relevant paragraph number. This was helpful in providing his views about the Costs Report. It also provided a response from Mr ZI to the comments that Mr AS had forwarded to the Standards Committee about that report. Perhaps not surprisingly, their views differed markedly on many of the issues.

Legal Complaints Review Officer: Hearing on the papers

[49] Both Mr AS and Mr ZI have consented to this Review being undertaken on the papers pursuant to s 206 of the Act. This process allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all the information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[50] I have had the benefit of considering all of the material that was provided to the Standards Committee, as well as Mr AS's submissions in support of the review and Mr ZI's response to those submissions.

Discussion

[51] The seven complaint issues that the Standards Committee identified at the beginning of its decision were considered globally. Although it was not specifically articulated, it would appear that the Standards Committee's view that the breach of Rule 2.3 of the Rules raised issues of acting without adequate instructions, failing to follow instructions and/or negligence/incompetence.

[52] I have considered whether to refer this complaint back to the Standards Committee pursuant to s 209 of the Act, with a direction that it reconsider and determine the other issues it identified at the beginning of its determination, as well as make a determination as to unsatisfactory conduct and a decision about publication. However, I have decided to deal with all matters as part of this Review. The complaint was first made in November 2010, and to refer the matter back to the Standards Committee will only further delay the parties' natural desire for closure. In addition, pursuant to s 211 of the Act I may exercise all of the powers of a Standards Committee when conducting a Review.

[53] I propose to first consider the issue relating to the Standards Committee's finding that Mr AS breached Rule 2.3 of the Rules. I will then deal with each of the other matters raised in the complaint and identified in the Standards Committee's determination.

Breach of Rule 2.3 of the Rules of Conduct and Client Care

[54] Rule 2.3 provides:

> A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal processes for the purpose of causing unnecessary embarrassment, distress, or inconvenience to another person's reputation, interests, or occupation.

[55] Rule 2.3 is explicit. On the one hand it reflects a lawyer's duty as an Officer of the Court to not trivialise or misuse the Court's serious processes. On the other hand, it reflects the importance of lawyers using their knowledge of the law and legal processes honourably and, to use the language of the Rule itself, properly. It prevents the advancement of a cause on behalf of a client whose only aim is disruption.

[56] The essence of this complaint is that Mr AS should never have used the statutory demand process against the three corporate entities; he knew or ought reasonably to have known that the debts were disputed by them. He therefore

misused legal processes. The result was that [Company A] and Mr ZI became engaged in a costly and, in its mind, ultimately time-wasting exercise.

[57] Mr AS and the firm both went to very great lengths in their various submissions to the Standards Committee, the sub-committee and to this Office, to describe the clear nature of their instructions from Mr ZI – namely that [Company A] wanted swift, decisive and emphatic action against the Entities to secure payment of a significant sum of money. These instructions came against a background of the firm having spent several months negotiating an arrangement with the Entities' lawyers (before Mr AS became involved), which then appeared to break down.

[58] I note that Mr ZI says that he drew the existence of the dispute resolution clause to the attention of Mr AS many times, and was told that the statutory demand was a more forceful way to achieve a positive result. Mr ZI's response effectively says that he was willing to entertain this procedure but ultimately, and contrary to his wishes, he was deflected away from it by Mr AS who seemed determined to use the statutory demand process. This seems to imply that his instructions to Mr AS, which were to explore alternative dispute resolution, were ignored.

[59] On the other hand, both Mr AS and the firm say the opposite: they were confronted with a client who wanted firm action taken to compel the debtor to pay the debt. Both Mr AS and the firm have emphasised that Mr ZI believed [Company A] was owed a significant sum of money, and that it was extremely frustrated with the delays in being paid. Indeed the firm, in commenting upon the sub-committee's report, comments that:[13]

> The assessors have significantly underestimated the forceful nature of the ZI's instructions to this Firm.

[60] Having carefully read the submissions of all the parties in relation to this important point, I have concluded that the version of events offered by Mr AS and the firm is to be preferred. I am not saying that I disbelieve Mr ZI when he says that there was a discussion about the alternative dispute resolution clause. However, having considered all of the information that was before the Committee, I consider that the

[13] Letter from the firm to the NZLS Lawyers Complaints Service, (7 October 2011), at [3].

dynamic at the time Mr AS became involved in June 2009 was one of frustration, anger and a desire for swift action – all of which are quite understandable given the to-ing and fro-ing between the parties over many months. I am satisfied that Mr AS's instructions were to proceed decisively in the manner that he did.

[61] However, merely being instructed to use legal processes does not remove a lawyer's responsibility to do so properly, and in accordance with Rule 2.3 of the Rules. A passionate client demanding swift action may nevertheless be on the other side of a genuinely disputed debt. A lawyer is still obliged to overcome the Rule 2.3 threshold before launching into action. Equally, a party to a debt who simply says "it is disputed" does not automatically shield themselves from attack by the statutory demand procedure.

[62] As discussed earlier, the commentary to Rule 2.3 provides as an example of misusing legal processes, issuing a statutory demand "knowing that … the debt is **bona fide** disputed" (emphasis added). In the present matter the Standards Committee considered that two items of correspondence from the Entities' lawyers were sufficient to put Mr AS on notice that the debts were in dispute. The Standards Committee acknowledged that one item of correspondence in and of itself would be "insufficient … to create a genuine dispute".

[63] It is important therefore to look at the correspondence from the Entities' lawyers in the overall context of the dispute, to determine whether there were reasonable grounds for Mr AS to conclude that the Entities had *bona fide* disputes to the debts. These letters preceded Mr AS's involvement in the matter, and were written at a time when another practitioner within the firm had been heavily involved on behalf of Mr ZI in negotiating with the Entities' lawyers for almost 12 months. Mr AS refers to an affidavit from the other practitioner within the firm in which he deposed that:[14]

> Neither [the Entities nor their lawyers] were showing any real interest in progressing matters, so amounts that remained outstanding to [the complainant] could be paid.

[14] Above n 1 at pg 2.

[64] Mr AS's assessment was that the Entities were not in fact disputing the overall debt position – in the case of two of the Entities the installations were being used and the issues concerned *warranty* rather than contract price issues. On the basis of his instructions from the ZIs, Mr AS had assessed that any potential counterclaim or set-off would have been less than the outstanding amounts, and that the statutory demand procedure was available for net undisputed sums.

[65] The combined effect of the letters was to raise warranty issues that might give rise to counterclaims or set-offs; the letters also made reference to the alternative dispute resolution clauses in the contracts. The instructions given by the ZIs for [Company A] were that a "significant sum" was owed that far exceeded any warranty issues. In addition, the alternative dispute resolution clause was voluntary and so both Mr AS and Mr ZI therefore viewed the two letters from the Entities' lawyers as being further attempts to delay and obfuscate.

[66] It is difficult to say whether further analysis of the position in June 2009 would have revealed that the sum alleged to have been owed was as "significant" as Mr ZI claimed. It took some time for that to be made clear and it involved the use of at least three experts. Even then (and for some time later) Mr ZI continued to maintain that the Entities still owed a significant sum.[15]

[67] I do not overlook the fact that [Company A] was ordered by the High Court to pay costs in relation to the three statutory demands that were issued. However, that alone is not indicative of professional wrongdoing in having filed the statutory demands. I am not prepared to speculate on the reasons for the costs order and note that there is no suggestion by the High Court that the statutory demand process was being used inappropriately. Indeed Mr AS has indicated that the Associate Judge who dealt with the matters acknowledged that the Court had jurisdiction to deal with the undisputed sums.[16]

[68] Nor is the question of professional conduct to be resolved by subsequently concluding that a different approach might have been preferable to that which was taken. Perhaps prudence might have dictated a less aggressive approach by Mr AS;

[15] Above n 13.
[16] Above n 7 at [8.16].

hindsight certainly suggests so. In this regard the sub-committee's comments about "clairvoyance" are apt.[17] For example, proceeding to Court in the face of an alternative dispute resolution clause – albeit a voluntary one – does carry with it the risk that the Court will defer hearing a claim until that process has been spent. But Rule 2.3 of the Rules is not designed to thwart decisive or even aggressive tactics; it is designed to prevent legal processes being used (in this case the statutory demand procedure) when there is a ***bona fide*** disputed debt.

[69] As at June and July 2009, when the advice was provided and the instructions given to proceed against three of the Entities using the statutory demand procedure, I am satisfied that Mr AS had reasonable grounds for believing that the amount to be claimed was well in excess of any counterclaim or set off that might be raised. For the sake of completeness, I also note that none of the corporate entities appeared to challenge the statutory demands on the grounds that there was a *bona fide* dispute; rather, and according to the sub-committee's report, two of the three corporate entities had submitted to the High Court that they wanted to explore and exhaust alternative dispute resolution.[18]

[70] It follows from that, that I disagree with the Standards Committee's determination that Mr AS breached Rule 2.3 of the Rules. As indicated, it would appear that the breach of Rule 2.3 fell to be considered under the issues of complaint described as acting without instructions, failing to follow instructions and negligence/incompetence. It follows from my finding that those issues of complaint have not been made out.

Overcharging

[71] Although the application for review did not challenge the Standards Committee finding that there had been overcharging, Mr AS's challenge to the finding that he had breached Rule 2.3 was accompanied by a submission that there was justification for what he called an 'uplift' to the fees as assessed by the subcommittee. I note that despite addressing many of the arguments and submissions made by Mr AS, Mr ZI did not respond to this final submission, although he had the opportunity to do so.

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[17] Above n 2.
[18] Above n 2 at [28].

[72] Having taken the view that there was no breach of Rule 2.3, it is appropriate to reconsider the costs revision. The subcommittee had undertaken an extensive and thorough analysis of the services undertaken and the fees charged against the fair fee factors contained in Rule 9.1, and its report recommended a fee in the range of between $35,000 and $40,000. The Standards Committee assessed the fee as half way between these recommended figures.

[73] I note that the Standards Committee decided to accept a figure in the middle of the recommended range, and found the reasonable fee to be $37,000 plus GST and disbursements. The fee originally charged for all the work was $70,296.30. Of this sum, $25,524 was found to relate to the High Court proceedings.

[74] It is not necessary to revisit the entirety of that subcommittee's report and Mr AS did not specifically challenge the finding that there had been overcharging. However, as I have noted, to the extent that his views about Rule 2.3 prevailed, he anticipated that a fees adjustment would be considered. Given my conclusion that there was no breach of Rule 2.3, I consider it appropriate to make some adjustment to the fee to reflect that finding, although I have not approached this in any exacting way.

[75] Given the somewhat global approach taken by the Standards Committee on assessing a fair fee, my review of the fee is not exacting, as I have also taken into account that the fee as invoiced may not have been upheld in any event. However, justice demands that some consideration be given to reflect the outcome of this review and I consider overall that an upward adjustment of $6,000 should be made. A fresh s 161(2) Certificate will be issued to that effect.

[76] I also observe that in ordering that the firm should reduce its fees pursuant to s 156(1)(e) of the Act, the Standards Committee omitted to make a determination that there had been unsatisfactory conduct. A finding of unsatisfactory conduct is a necessary pre-requisite to making any of the orders under s 156 of the Act

[77] Pursuant to s 211 of the Act I therefore modify the Standards Committee's decision by adding a determination that there has been unsatisfactory conduct by

Mr AS in relation to the fees charged to the complainant, and which were reduced by the Standards Committee.

Discourtesy

[78] Mr ZI alleges that Mr AS was unwilling to listen to what they had to say, that he belittled them, he was patronising, very aggressive and dismissive of their concerns.[19] This aspect of the complaint engages Rule 3.1 of the Rules, which relevantly provides "a lawyer must at all times treat a client with respect and courtesy".

[79] For his part Mr AS rejects this complaint. To the extent that partners in the firm were involved in attendances between Mr AS and the ZIs, Mr AS is supported by the firm. In essence Mr AS and the firm both say that Mr ZI had very firm views and high expectations; that he provided clear instructions and did not deviate from those instructions. They both describe lengthy and clearly intense meetings with Mr ZI, during which there were robust exchanges from time to time. And, of course, ultimately Mr ZI was not successful in recovering the significant sum it believed it was owed by the Entities.

[80] Such a relationship is not uncommon between lawyers and their clients. A client often feels confused and overwhelmed by the legal situation they find themselves in. Many have firm views about how things should be done. Full, frank and free exchanges between lawyer and client are often called for. These will sometimes involve a lawyer telling their client something the client was not expecting, or not wanting, to hear.

[81] Not all such exchanges will amount to a breach of Rule 3.1 of the Rules. The Rule is not designed to prevent a lawyer from giving frank advice in unambiguous terms. It seems to me that the complaint of discourtesy has been raised in the context of Mr ZI's overall dissatisfaction with the advice and representation it received following Mr AS's involvement in June 2009. I note for example that Mr ZI did not raise these concerns with Mr AS's employers until things went awry for them, in May 2010; some 11 or 12 months after Mr AS first became involved. I am also mindful of the fact that

[19] Complaint to NZLS dated 11 November 2010 at pg 4.

Mr AS and the firm disagree with the complaint that Mr AS was discourteous. They describe occasions when robust advice was necessary.

[82] Given the different points of view of Mr ZI, Mr AS and the firm on this issue, I cannot be satisfied that this aspect of the complaint raises any professional standards issues on the part of Mr AS. I also observe that the complaint is not one which goes to the very heart of the professional obligations of a lawyer. Accordingly I do not propose to consider the matter further and thereby decline to take any further action in relation to this aspect of the complaint pursuant to s 152(2)(c) of the Act.

Inadequate reporting and communication and refusal to hand over documents

[83] I propose to deal with these two matters of complaint together as they are interlinked. For the most part these complaints relate to the arbitral process, which began in approximately November 2009 and culminated with the arbitration/expert-led mediation in May 2009. In particular Mr ZI says that he did not receive a copy of their expert's proposals, recorded in a Memorandum.

[84] These matters of complaint appear to engage Rule 7 of the Rules, which, in summary, requires a lawyer to promptly disclose relevant information to a client; to ensure that a client understands the nature of the legal work being undertaken; to keep a client informed about progress; and to promptly answer requests and inquiries.

[85] As with the complaint about discourtesy, there are differences of opinion between Mr AS and Mr ZI. For his part, Mr AS refers to "numerous emails and… numerous … electronic time records showing telephone and personal attendances [on Mr ZI by the practitioner]." Mr AS also says that he provided Mr ZI with "initial expert reports showing (the expert's) opinion".[20]

[86] In his response to the initial complaint Mr AS also describes a lengthy meeting and subsequent telephone conference involving himself, Mr ZI and the expert during adjournments of the arbitral proceedings, at the conclusion of which the director said he was happy with the expert's proposals, which were easy to implement and attend to.

[20] Above n 7 at [13].

[87] A client who has unsuccessfully pursued an expensive course of action, such as occurred here, will inevitably feel that better and more informed communication from their lawyer may have led to different decisions being made. This is human nature, we look for reasons to explain how things could have gone so wrong, and for things that could have been done differently.

[88] Doubtless Mr AS will reflect upon this case as a whole and conclude that there were things that could have been handled differently. However in the end, and after reviewing all of the material before me, I cannot say that Mr AS's obligations of disclosure and communication under Rule 7 of the Rules have fallen below the standard required, such that professional standards issues are raised.

[89] Accordingly, I decline to take any further action in relation to this aspect of the complaint pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006.

Decision

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

i. reversed as to the finding that Mr AS breached Rule 2.3 of the Rules of Conduct and Client Care by issuing Notices of Statutory Demands under the Companies Act 1993;
ii. reversed as to the censure for breach;
iii. modified by making a determination of unsatisfactory conduct against Mr AS in respect of the quantum of fees; and
iv. modified in respect of the reduction of fees.

[91] Pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006, I decline to take any further action in relation to the complaints of discourtesy, inadequate reporting and communication and refusing to hand over documents.

DATED this 21st day of March 2014

Hanneke Bouchier
Legal Complaints Review Officer

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

Mr AS as the Applicant
Mr ZI and Director for [Company A]
Mr TG as a related person or entity.
[A North Island] Standards Committee
The New Zealand Law Society