LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2020] NZLCRO 180

Ref: LCRO 72/2020

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

DECISION

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

Introduction

[1] Mr ZW has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of his complaint concerning the conduct of the respondent, Mr CB.

Background

[2] Mr ZW's house was undergoing renovations. The roof was removed. The house was enclosed with shrink wrap to provide protection against the elements. The house was hit by a storm. The shrink wrap failed and, as a consequence, both the house and its contents suffered damage.

[3] The cost of the water damage was estimated to exceed $100,000.

[4] The insurer of the home refused to provide cover. The insurance company providing cover for the construction work would not respond to Mr ZW's requests to provide cover.

[5] Mr ZW also encountered difficulties with the scaffolding company that had erected the scaffolding. The company refused to repair the damaged scaffolding unless Mr ZW paid them a sum of $5,510.80, together $8,022.40 for cost of the shrink wrap material.

[6] Mr ZW instructed Mr CB in July 2017.

[7] In November 2018, Mr CB advised Mr ZW that an application to the Insurance and Financial Services Ombudsman (IFSO) would be completed, but that further work in respect to advancing proceedings against the scaffolding company would not be progressed until outstanding fees had been paid.

[8] In February 2019, Mr CB advised Mr ZW, that he would not be doing any further work on Mr ZW's file, until Mr ZW settled his outstanding accounts.

[9] In March 2019, Mr CB filed proceedings in the Disputes Tribunal seeking recovery of $4,087.10, being the balance of fees outstanding at that time.

[10] Mr ZW was invoiced a total of $17,528.30 (inclusive of GST).

[11] Mr ZW paid $13,441.20 towards his legal fees.

The complaint and the Standards Committee decision

[12] Mr ZW lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 13 May 2019. His complaint, expressed in his words, was that:

(a) Mediation was agreed to resolve claim of repair damage against 4 parties identified;

(b) Instead concluding two IFSO applications against two insurance companies involved;

(c) Draft proceedings prepared at a cost but no action taken or further proceeded;

(d) Legal cost: not fair or reasonable. Too high with no successful outcome;

(e) Request for invoice breakdown declined;

(f) Relied on professional expertise or experience to advise if a legitimate claim to proceed on successful outcome; and

(g) At initial consultation – discussed as an estimate of $8,500 to $10,000 legal cost required to achieve a mediation outcome.

[13] In correspondence to the Complaints Service on 22 May 2019, Mr ZW provided further clarification of his complaint. He provides brief background to the difficulties he had encountered with his property, a concise account of steps that had been taken, and a summary of his complaints against Mr CB. Those were described as:

(a) misconduct; and

(b) incompetence; and

(c) providing of negligent advice; and

(d) breach of duty of care; and

(e) poor service.

[14] In summary, I understand Mr ZW's complaint to be that he was charged too much, and received little value for the fees paid.

[15] Mr CB provided a comprehensive response to Mr ZW's complaint on 25 June 2019.

[16] In that response Mr CB gave a detailed account of the retainer.

[17] He explained that he had:[1]

(a) in his initial meeting with Mr ZW, identified the potential parties against whom claims could be proceeded (builder/scaffolder/insurance companies); and

(b) cautioned against commencing proceedings against the builder until necessary repair work had been completed; and

[1] The summary of steps taken is not exhaustive.

(c) advised of the need to obtain an assessor's report and a report from a building expert; and

(d) informed Mr ZW of the high cost of legal action ($30,000–$40,000) and risk of litigation costs; and

(e) advised that a sensible approach would be to endeavour to recover some of his costs from each of the parties; and

(f) indicated that there was possibility that the dispute could be mediated; and;

(g) provided further advice on issues with the scaffolders; and

(h) drafted correspondence to NZI (an insurer); and

(i) considered and provided advice on issues relating to the claim against Builtin (an entity involved in arranging construction insurance); and

(j) received approximately 150 pages of policies and correspondence for perusal; and

(k) attended further meetings with Mr ZW; and

(l) discussed further costs with Mr ZW in February 2018 and provided an estimate for further costs in drafting letters of demand. This approach was overtaken by Mr ZW's decision to attend to the drafting of the demands and have them reviewed; and

(m) drafted correspondence; and

(n) provided an indication that he did not consider Mr ZW's potential claim against NZI was strong; and

(o) responded to parties who had received advice of Mr ZW's claim; and

(p) reviewed telephone recordings made by Mr ZW; and

(q) met further with Mr ZW in April 2018 to review progress; and

(r) reviewed further information provided by Mr ZW; and

(s) engaged in a process of forwarding correspondence to Mr ZW for review; and

(t) discussed responses received with Mr ZW; and

(u) engaged in multiple discussions and correspondence with parties against whom Mr ZW was seeking to recover losses, and

(v) considered potential mediators; and

(w) prepared a draft statement of claim for mediation, and

(x) dealt with all matters arising from the IFSO complaint; and

(y) held discussions with IFSO; and

(z) prepared a second claim to IFSO.

[18] In providing an account of the steps that had been taken on the file, Mr CB also explained the responses provided when Mr ZW had, in the course of the retainer, raised concern about fees charged and what had been achieved.

[19] Mr CB rejected suggestion that no tangible results had been achieved from the initial meetings, noting that he had advised Mr ZW on his rights and options, and provided guidance on an initial strategy.

[20] Addressing complaint that he had failed to provide Mr ZW with a breakdown of his fees, Mr CB advised that he had, on 26 July 2018 provided Mr ZW with a breakdown of the invoices. No further request for clarification of his accounts had been received.

[21] On 17 December 2018, Mr ZW again raised concern that fees were being incurred for what he perceived to be no demonstrable outcome.

[22] Mr CB says that it was agreed at that meeting that a decision as to further steps would be taken on learning the outcome of the IFSO complaint that had been advanced against Builtin.

[23] On 12 February 2019, Mr ZW was informed that no further steps would be taken until outstanding accounts were settled.

[24] Mr CB noted that during the course of the retainer, he provided regular invoices to Mr ZW which recorded the work being done.

[25] Mr CB, in summarising his response to Mr ZW's complaint, said this:

> "In relation to Mr ZW's allegations of misconduct, negligent advice, breach of duty of care and poor service for not doing what I said we would do, I deny all those allegations. The advice given was appropriate for the difficult situation Mr ZW had found himself in by not taking out all the necessary insurances to cover for storm damage when his builder removed the roof of his house. We advised appropriately on the possible claims against each party and discussed the options available to Mr ZW and at all times acted on his instructions for the options he chose. We consider that our advice was appropriate and reasonable at each stage of the multiple processes followed and that we did what we said we would do in a timely and professional way."[2]

[26] Mr ZW provided a paragraph by paragraph response to Mr CB's comprehensive submission, dated 12 August 2019.

[27] The salient points of Mr ZW's response were that:

(a) His understanding at the meeting of 24 July 2017 was that Mr CB's indication of costs in the sum of $30,000–$40,000 were to advance the matter through Court; and

(b) A firm estimate was given of costs to proceed the matter to mediation ($8,500–$10,000); and

(c) Mr CB failed to provide clear advice as to how objectives could be achieved, his approach was responsive rather than proactive; and

(d) Costs had been incurred for drafting correspondence when Mr ZW had drafted the letters; and

(e) Mr CB had failed to advise of the pros and cons of submitting complaints to the IFSO; and

(f) Mr CB should have taken steps to discuss outstanding fees and any possibilities for further action before issuing proceedings in the Disputes Tribunal for recovery of his fees; and

(g) Costs exceeded what had been anticipated; and

(h) Request for clarification of invoices had been met with response that this would incur cost.

[2] Mr CB, correspondence to NZLS (25 June 2019) at [218].

[28] In summary, Mr ZW contended that:

(a) Mr CB had failed to provide him with competent legal advice; and

(b) costs incurred were excessive; and

(c) no tangible results were achieved for costs expended.

[29] The Standards Committee, equipped with extensive submissions from both parties, identified the issues to be addressed as:

(a) whether Mr CB charged more than a fee that was fair and reasonable for the services provided; and

(b) whether Mr CB failed to act competently and in a timely manner consistent with the terms of the retainer and duty to take reasonable care.

[30] In identifying these two issues as the focus of its inquiry, the Committee acknowledged that Mr ZW had raised a number of issues in his complaint. The Committee noted that it had given careful regard to all the issues raised by Mr ZW, but had concluded when all of the alleged conduct was taken into account, that Mr CB had not breached any of his professional obligations owed to Mr ZW.

[31] The Standards Committee delivered its decision on 24 February 2020.

[32] 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.

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

(a) Mr ZW had been actively involved in the progressing of the retainer; and

(b) Mr ZW had been invoiced on a regular basis; and

(c) the matter was complex; and

(d) having considered the relevant fee factors, fees charged were held to be fair and reasonable; and

(e) the correspondence indicated that Mr ZW had been provided with competent and timely advice.

Application for review

[34] Mr ZW filed an application for review on 16 April 2020.

[35] He submits that:

(a) The Standards Committee inquiry was only focused on the issue as to whether fees charged were fair and reasonable; and

(b) His original letter of complaint (as described by Mr ZW- "in defence") didn't mention fees.

[36] Mr ZW attached to his review application, his correspondence to NZLS of 22 May 2019, and his response to Mr CB of 12 August 2019.

[37] Essentially, his application for review replicated the information he had provided to the Standards Committee.

[38] Mr CB was invited to comment on Mr ZW's review application. He indicated that he had nothing further to add.

Nature and scope of review

[39] 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.

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

[40] 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.

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

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

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

Hearing

[42] A hearing, attended by both parties, proceeded on 16 September 2020.

Discussion

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

(a) Did Mr CB provide Mr ZW with competent representation?

(b) Were the fees charged fair and reasonable?

Did Mr CB provide Mr ZW with competent representation?

[44] At the core of Mr ZW's complaint that Mr CB failed to adequately represent him, is argument that substantial fees were incurred for no benefit.

[45] In his initial complaint, Mr ZW described this aspect of his concern as argument that no successful outcome had been achieved.

[46] When subsequently elaborating on his complaint, Mr ZW elevated what he had initially described as a failure to achieve an outcome, to more serious allegation that

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

Mr CB had breached the duty of care owed to him, that his conduct approached the level of misconduct, and that his representation had been negligent.

[47] Neither a Standards Committee nor a Review Officer may make findings that a lawyer's conduct amounts to misconduct.

[48] The conduct finding available to both Standards Committees and a Review Officer, is confined to a finding that the lawyer's conduct is considered to have been unsatisfactory.[5]

[49] Nor is a Committee or a Review Officer equipped to make negligence findings.

[50] In *PR v LT*, the Review Officer noted that:[6]

> [107] Negligence is a cause of action that is well-understood by traditional civil courts. Its ingredients include a duty of care, a breach of that duty, and a measurable loss that has been caused by the breach of duty. Findings of negligence may only be arrived at after comprehensive – sometimes expert – evidence has been given. Issues that often arise in claims of negligence include whether a person has breached their duty of care, or whether there is a connection between the alleged loss and the breach of duty. Complex arguments often arise about whether any loss has been suffered.
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> [108] Neither a Standards Committee nor the LCRO is equipped to make findings of negligence. The default position for a Standards Committee is to conduct their hearings on the papers. A negligence analysis is simply not possible with that process.

[51] I note that in the course of advancing his review, Mr ZW did not couch his complaint in terms that suggested Mr CB's conduct would approach the level of misconduct, nor did he advance argument that Mr CB had been negligent.

[52] It is open to a Standards Committee (and a Review Officer) to make findings that a lawyer's conduct has been unsatisfactory in circumstances where it is determined that a lawyer's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[7]

[53] In *R v EL* the Review Officer considered a lawyer's obligation to provide competent representation to their client.[8]

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[5] As defined in s 12 of the Act.
[6] *PR v LT* LCRO 232 & 234/2016 (7 March 2017).
[7] Section 12(a) of the Act.
[8] *R v EL* LCRO 205/2015 (27 June 2019) at [41]–[59].

[54] In the course of providing regulated services to their client, a lawyer must act competently, and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.[9]

[55] The duty to act competently has been described as "the most fundamental of a lawyer's duties" in the absence of which "a lawyer's work might be more hindrance than help".[10]

[56] The standard of competence is an objective one. The question is whether the lawyer under scrutiny applied the care or skill that any reasonable lawyer in the same position would have done.[11]

[57] It has been noted that lawyer competence, though pivotal to public confidence in the profession and the administration of justice, lacks any generally accepted meaning; it instead takes its flavour from the perspective of the observer.[12]

[58] Not surprisingly, neither the Act, nor the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), attempt to lay down a definitive definition of competence, a determination of which must inevitably be attempted through an examination of a variety of factors including, but not limited to, the nature of the retainer and the context in which the conduct complaint arises.

[59] It is important to recognise that an obligation to provide competent advice does not impose unreasonable burden on a practitioner to be always right, or to always provide the right advice.

[60] It has been noted that:[13]

> While there is an existing professional duty of competence in New Zealand, albeit one which is particularly narrow, there is no duty to provide a high level of service to clients. The duty of competence is, in reality, a duty not to be incompetent and is aimed at ensuring minimum standards of service.

[61] What may on first reading present as a singularly less aspirational objective for a profession than would be expected is, on closer examination, an affirmation of a

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[9] Rule 3 of the Rules.
[10] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington 2016) at [11.1].
[11] At [11.3].
[12] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [4.2].
[13] Webb, Dalziel and Cook, above n 10 at [11.3].

reasonable standard of expectation of the level of competency required of lawyers. All lawyers are expected to provide a competent level of service to their clients.

[62] Mr ZW was invited at the hearing to explain how he considered the work done by Mr CB to have been of no use to him at all.

[63] Reduced to its essence, his concern was that he did not consider that he had received any tangible benefit for the costs incurred.

[64] By tangible benefit, Mr ZW meant that he was concerned that Mr CB had been unable to secure compensation from any of the parties he held responsible for the significant losses he had suffered.

[65] To the extent that this raises suggestion that Mr CB failed to competently represent him, Mr ZW is arguing that Mr CB took steps that were fruitless when he should have appreciated that those steps would take Mr ZW nowhere, or, that Mr CB failed to identify a strategy that would have resulted in a more productive outcome.

[66] Alternatively, Mr ZW's argument, in the manner it is framed, is complaint that he should have been advised at the outset that he had little chance of recovering his losses. Prompt indication of a fruitless cause would have minimised his legal costs.

[67] In addressing the question as to whether Mr CB acted both competently and diligently, I have carefully considered:

(a) the issues/problems that Mr CB was being asked to address; and

(b) the initial instructions provided to Mr CB and the file notes made by him recording the scope of the instructions; and

(c) the steps taken by Mr CB and the responses received; and

(d) the extent and nature of the communications between Mr CB and Mr ZW during the course of the retainer; and

(e) the extent to which Mr CB's options were influenced or dictated by the approach adopted by the parties against whom Mr ZW was seeking to recover.

[68] The issues that Mr CB was required to address were complex.

[69] The dispute engaged a number of parties.

[70] It was not immediately apparent as to where Mr ZW's best option for recovery lay.

[71] These difficulties were compounded by the uncertainty as to whether Mr ZW's existing insurance policies covered his loss, and the uncertainty as to whether his insurers could be held liable for that loss as a consequence of their failing in their duty of care to provide Mr ZW with adequate advice.

[72] None of the parties who had been identified as being a potential target for a compensation claim were likely to passively acquiesce to acknowledging liability.

[73] Mr ZW was in a difficult position. After his home had been damaged he had to attend to remedial work immediately to mitigate against further loss. He had already suffered a substantial financial loss. Decisions as to how remedial work would proceed had to be balanced against an assessment as to the likelihood of him recovering costs from his insurers, builder and scaffolder.

[74] Understandably, having expended a considerable sum in legal fees for no result, Mr ZW now asks the question as to whether those costs were justified.

[75] At commencement, Mr ZW was in the unenviable position faced by many litigants when confronted with the difficult decision as to whether to commence legal action in circumstances where there is uncertainty of outcome and no guarantee of prospect of success.

[76] The issues that Mr CB was required to assess were complex. At their heart was the question as to who, if anybody, could be held accountable for the substantial losses that Mr ZW had suffered

[77] As is commonly the case in building disputes where a number of parties are involved, it was not immediately apparent where Mr ZW's best chance for recovery lay.

[78] There was uncertainty as to whether Mr ZW's existing insurance policies covered his losses and no immediately clear answer as to whether his insurers could be held liable for his loss as a consequence of their failure to provide him with adequate advice.

[79] Mr ZW now argues that Mr CB should, at commencement, have advised him that his claims had little prospect of success. This was not an argument that Mr ZW initially advanced with particular robustness. When asked to identify his major concerns about the representation he had received from Mr CB, Mr ZW argued, though not with any degree of force, that Mr CB should have informed him at the start that his claim would go nowhere. This argument is overarched with accusation that Mr CB failed to follow the initially agreed strategy, which was to attempt to get the parties to mediation.

[80] It approaches the trite to emphasise that it is impossible in almost all cases for a lawyer to provide a guarantee of successful outcome in a litigation matter of this nature. However, it can be expected of a competent lawyer that they are able to advise their client at commencement, as to whether it is in the client's interests to embark on advancing a compensation claim, and to provide their client with a measured assessment of likely risk, including an estimate of potential costs.

[81] In short, it is expected of a lawyer providing competent advice to a client, that the hazards of advancing the claim are identified and that the client is appropriately cautioned as to the risk of proceeding in circumstances where the lawyer could, and should, be able to identify that their client's potential claim has but modest prospect of success.

[82] The hardest cases are those (and I consider this to be one of them) where the particular facts of the case give an indication that there are demonstrable grounds to build a case, but there can be no certainty as to whether the case will succeed.

[83] It is inevitable that on occasions the strengths and weaknesses of a particular case will only become fully apparent when responses have been received from the other parties and there is opportunity for the robustness of the lawyer's client's case to be measured against the arguments advanced by the other side.

[84] It is also the case that fragilities in the lawyer's client's case may only become exposed some way down the track, when the client's evidence is fully put under scrutiny.

[85] On occasions, a decision to proceed a claim will be heavily influenced by a client's belief that they have no option but to "give it a go". In circumstances where a client has suffered substantial loss and the client has an emphatic view that the loss was caused by the actions of others, that can be a strong motivation for a client to proceed.

[86] But underpinning a lawyer's obligations in circumstances such as those faced by Mr ZW where a client has suffered substantial and unexpected financial loss, and where that loss has been not just economically but also emotionally devastating to the client, is the need to ensure that the client, who is in a position of some vulnerability, is fully informed as to the risks and costs involved in commencing litigation.

[87] A decision to advance a claim must be one taken with careful consideration of the facts of the particular case, an attention to and an understanding of the legal issues engaged by the case, an appreciation of those areas where the client's case is vulnerable, and a realistic assessment of the client's capacity to weather the financial storm that is frequently the close travelling companion of prolonged litigation.

[88] An assessment of the approach adopted, steps taken, and advice offered by Mr CB, is assisted by an examination of the abundant file notes made by Mr CB.

[89] Mr CB indicated at the hearing that it was his long-standing practice to make comprehensive and frequent file notes. A scrutiny of the file confirmed his adherence to that practice in this case.

[90] Mr CB made file notes recording all his meetings with Mr ZW, and many of his telephone conversations. The notes are comprehensive and illuminating of the steps that were being taken, the advice that was being given, and the degree to which Mr ZW was involved in the decision-making.

[91] The extent to which Mr ZW was actively involved with the file is a particular feature of this case.

[92] From commencement, Mr ZW was providing Mr CB with firm and clear instructions as to how he wished for matters to proceed.

[93] Mr CB's first file note provides a comprehensive account of the instructions provided and gives abundant indication of Mr CB having traversed with Mr ZW possible options and approaches.

[94] It is clear that Mr CB cautioned Mr ZW as to the costs that would be incurred if the matter was to proceed to court.

[95] Whilst the possibility of having the parties attend mediation was seen as a possible option, it was not the case that this option was identified as the only approach, or an approach to be focused on to the exclusion of others.

[96] Mr CB's file note records, not surprisingly, that the first step would be to communicate with the insurer and put them on notice that Mr ZW challenged the decision to decline his claim.

[97] Mr ZW's agreement with and acquiescence to this initial approach is amply illustrated by his instructions to Mr CB that he (Mr ZW) would draft the initial correspondence.

[98] I do not propose to provide account of all that followed, except to note that it is clear from the file notes and exchanges of correspondence between Mr ZW and Mr CB, that Mr ZW was an intelligent and competent client, who was committed to being involved in all the significant decisions made.

[99] Mr ZW adopted, in my view, a refreshingly assertive approach in his dealings with Mr CB. He was not tacitly following Mr CB's lead on all matters. He was engaged and productive. He was not averse to criticising Mr CB when he considered that Mr CB had overlooked matters that Mr ZW considered significant.

[100] For his part, Mr CB's approach to Mr ZW's case was both careful and conscientious. A feature of his management of Mr ZW's file, was the extent to which he kept Mr ZW informed.

[101] Importantly, when options being pursued hit a brick wall, alternatives were discussed.

[102] Nor was it the case that Mr CB failed to caution Mr ZW when he considered that pursuing various options would not be fruitful. Mr CB advised Mr ZW early in the piece that he did not consider that advancing a claim against NZI would be productive. He counselled Mr ZW against commencing proceedings against the builder until remediation work had been completed.

[103] Mediation options were not discounted by Mr CB. To the contrary, there is indication that he was endeavouring to promote that option, but as Mr CB correctly noted at the hearing, he could not force the parties to mediate.

[104] It is also clear from the file that Mr CB's attempts to achieve a settlement for Mr ZW were frustrated by two obstacles which commonly impede the path to settlement: a well-resourced and competently represented opponent, and an opponent who appeared to be adopting delay and non-response as a litigation tactic.

[105] As matters progressed and the parties' positions crystallised, it became clear that there were vulnerabilities in Mr ZW's positions that were being exposed. Whether these vulnerabilities would have proven fatal to Mr ZW's case could only have been determined if the case proceeded to a contested hearing, but the raising of argument and counter-argument in the challenging of the parties' evidence were factors which inevitably contributed to the prolonging of the litigation process and an escalation in costs.

[106] Having carefully considered the parties' written submissions, the parties' submissions at hearing, and having reviewed the file, I am satisfied that:

(a) Mr ZW had a contestable case; and

(b) Mr CB advised Mr ZW at commencement of the options available; and

(c) Mr ZW was well informed throughout and supportive of the steps being taken; and

(d) the steps taken are not reflective of Mr CB adopting an approach that was not sanctioned by Mr ZW; and

(e) Mr CB had provided competent representation throughout.

Were the fees charged fair and reasonable?

[107] As previously noted, Mr ZW's review application indicated that he was critical of the Standards Committee for focusing attention on the question as to whether fees charged were fair and reasonable, noting in his review application, that his original letter of complaint did not mention fees.

[108] That was not the case and I had opportunity to clarify any potential misunderstanding with Mr ZW at the review hearing.

[109] Mr ZW's complaint identified one of his concerns as being that "legal cost- not fair/reasonable, too high with no successful outcome".[14]

[110] I am satisfied that Mr ZW's complaint raised concerns regarding the fees charged, but it is clear that his objection to the fee was primarily advanced on grounds

[14] Complaint (13 May 2019).

that the litigation strategy advanced by Mr CB was considered by Mr ZW to have been unsuccessful.

[111] To the extent his complaint encompassed a criticism of Mr CB's fees, his complaint was that significant costs had been incurred for no benefit. Mr ZW's fee complaint was then closely intertwined with criticism that he had not been competently represented. That criticism has been comprehensively addressed, and I have no need to traverse it further.

[112] For completeness however, I have considered the complaint that Mr CB's fees were not fair or reasonable by reference to the conventional approach adopted when addressing a fee complaint, that is by a consideration of the fee charged with reference to rr 9 and 9.1 of the Rules.

[113] Rule 9 provides:

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

[114] Rule 9.1 provides:

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

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

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

(l) the reasonable costs of running a practice:

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

[115] I have reviewed Mr CB's time records and cross-referenced those records to the Standards Committee file.

[116] Work completed by Mr CB accurately reflects his record of the work undertaken.

[117] There is no indication of Mr CB having engaged in work that was unnecessary or repetitive, or evidence of him having spent an excessive amount of time on a particular task.

[118] Mr CB is an experienced practitioner.

[119] I accept the conclusion of a Standards Committee comprised of a number of practitioners with significant experience in litigation and disputed insurance claims, that Mr CB's charge-out rate was reasonable for a person of Mr CB's experience, and commensurate with the rates customarily charged by experienced practitioners when providing similar legal services.

[120] I consider rr 9.1 (a), (b), (d), (f) and (g) to be of particular significance when considering the fairness and reasonableness of the fee charged.

[121] A considerable amount of time (accurately recorded) was spent on the matter. The issues were complex and required a lawyer with specialised knowledge and experience in insurance and building law. Mr CB had the requisite experience.

[122] The matters were both complex and urgent.

[123] I am satisfied having considered the relevant fee factors, the submissions provided, the time records, and the material on the file, that the fees charged were fair and reasonable.

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

Anonymised publication

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

Decision

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

DATED this 29TH day of September 2020

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R. Maidment
Legal Complaints Review Officer

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

Mr ZW as the Applicant
Mr CB as the Respondent
Mr MN as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society