LCRO 79/2014

CONCERNING an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING a determination of the Standards Committee

BETWEEN **HR (on behalf of [Company])**

Applicant

AND **OW and CT**

Respondents

DECISION

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

Introduction

[1] In a decision dated 18 May 2015, findings of unsatisfactory conduct pursuant to s 12(a), (b) and (c) were recorded in respect of conduct by Mr CT and Ms OW (the decision).

[2] The conduct related to a failure to negotiate agreement with HR over his fees before he carried out their instructions over a period of seven months. That conduct was found to have fallen short of the standard of diligence a member of the public is entitled to expect of a reasonably competent lawyer, and fell within the definition of unsatisfactory conduct in s 12(a) of the Act.

[3] Failing to establish a fees framework and paying no attention to the costs associated with Mr HR responding to their instructions was found to be conduct that would be regarded by lawyers of good standing as unacceptable. That conduct fell within the definition of unsatisfactory conduct set out in s 12(b) of the Act.

[4] Ms OW and Mr CT's conduct was found to have contravened two of the Conduct and Client Care Rules. Rule 10 by not promoting and maintaining proper

standards of professionalism in their dealings with Mr HR; and rule 12 by not conducting their professional dealings with Mr HR with integrity, respect and courtesy. Those contraventions fell within the definition of unsatisfactory conduct under s 12(c) of the Act.

[5] By delegating management of the file to Ms OW but not supervising or managing the establishment of a fees framework or ensuring Mr HR's costs as he responded to their instructions were monitored over seven months, Mr CT was also found to have contravened rule 11.3. That contravention also fell within the definition of unsatisfactory conduct under s 12(c) of the Act.

[6] The lawyers' conduct was found to have been inconsistent with the purposes of the Act, fundamental obligations that rest on lawyers under the Act, and with practice rules made under the Act.

[7] As findings of unsatisfactory conduct were made for the first time on review, the parties were given the opportunity to comment on what consequences, if any should follow.

[8] This decision addresses the parties' submissions, sets out the orders made under s 156 of the Act, and imposes costs on review pursuant to s 210 of the Act.

[9] There is no public protection reason that could support identifying either lawyer through publication. However, because many lawyers routinely instruct third parties, a direction is made pursuant to s 206(4) that publication of the decision and this decision is desirable in the public interest with any identifying details removed.

Mr HR's submissions

[10] Mr HR does not seek compensation, or suggest the imposition of any other order under s 156, but he would like to recover some of the costs he says he has incurred in being a party to the complaint and review processes.

Submissions by counsel for Mr CT and Ms OW

[11] Counsel submits that the only appropriate orders are by way of a fine and a contribution to the costs on review. In particular he says the question of compensation does not arise on the present facts because of the terms of settlement the parties

reached. Counsel refers to three of the functions that penalty orders fulfil in the disciplinary context drawn from the Court of Appeal decision in *Wislang*:[1]

(a) To punish the practitioner.

(b) As a deterrent to other practitioners.

(c) To reflect the public's and the profession's condemnation or opprobrium of the practitioner's conduct.

[12] Counsel also submits that the selection of appropriate orders is closely linke*d to th*e relative seriousness of the conduct, and refers to the arrangements the lawyers made with Mr HR when engaging him in *April* 2010. Counsel submits that the issues that arose in briefing Mr HR relate to "a one off isolated incident". He says both of the lawyers are "experienced litigators" who regularly instruct third party experts in court proceedings and have had no previous difficulties with professional discipline. Both lawyers are said to now be "more conscious of expressly agreeing the parameters when instructing third parties to act on a client's behalf".[2]

[13] Counsel's submission that the lawyers "worked closely together on this file" does not directly address the conduct aspect of the matter. Mr CT's evidence at the review hearing, reflected to an extent in counsel's submissions, is broadly uncontentious. Mr CT has over 20 years experience as a litigator, routinely delegates work to others, and has personally and through others, instructed any number of third party experts in his years of practice. It would be implausible for Mr CT to say he was unfamiliar with the risks associated with delegation, including those presented by rule 11.3, in circumstances such as the present.

[14] Counsel describes as unfortunate the lack of "discussion or common understanding as to the quantum of the fee that the practitioners expected to be charged", and which resulted in a significant difference of opinion with Mr HR on this occasion. That failing signals a lack of risk management by Mr CT of Ms OW's conduct, which attracted personal and professional risk for him; and a lack of attention by Ms OW to Mr HR and his fee expectations, which attracted personal and professional risk for her.

[15] Although Mr CT said he did not have "intimate dealings" with the file, he and Ms OW agree that they worked as a team, and she was involved in the intimate detail of

[1] *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA).
[2] Submissions [counsel] to LCRO (22 June 2015) at [12].

the file. Ms OW accepted she was responsible for identifying appropriate witnesses, one of whom was Mr HR. She contacted him, discussed the client's position with him and instructed him. She was also engaged on the detail of the file, including checking the regulatory position as it related to Mr HR's instructions, liaising with Mr HR over revisions and amendments to his draft reports, and liaising with the client with respect to Mr HR's final report. All of that is consistent with Mr CT's evidence, unchallenged by Mr HR, and indicates she is a capable and experienced lawyer.

[16] The lawyers' litigation expertise is not a contentious aspect of this review. It is their inattention to their professional obligations that is problematic. There is no dispute that it was Ms OW who requested, received, and was shocked by, Mr HR's fees. Ms OW's suggestion that she can be excused from compliance with rule 12.2 because she was an employee of [Law Firm A] is troubling because of its inconsistency with the plain wording of rule 12.2 which attracts "personal responsibility" for payment of Mr HR's fees.

[17] The evidence is that neither lawyer was alert to the need to put some kind of framework around the fees Mr HR might charge before he acted on the lawyers' instructions. Given her direct involvement and level of experience, it is difficult to understand how Ms OW could have been oblivious to how her calls on Mr HR's resources might impact on his view of the value of his work.

[18] As neither lawyer claims to have turned his or her mind to how Mr HR's fees might be managed at the outset or over the months that followed, I accept counsel's submission that both lawyers' conduct was "unintentional and inadvertent". Counsel's submissions emphasise the time Mr HR spent and sought to recover.[3] Time, however, was not Mr HR's only resource; nor is it a universal measure of value. Measuring value and calculating payment generally involves a degree of subjectivity. That is why the lawyers, experienced and familiar with the uncertainties associated with litigation as they were, should have ensured that their discussions with him included reference to some kind of agreed framework under which fees could be calculated. Their failure plainly caused Mr HR significant inconvenience.

[19] Counsel submits the findings of unsatisfactory conduct reinforce that "it is primarily the practitioners' responsibility to ensure that there is no such misunderstanding when instructing third parties". Counsel's submission, and the unsatisfactory conduct findings, are broadly consistent with, and reinforced by, the

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[3] At [7], [8] and [10].

plain wording of rule 12.2. That rule imposes personal responsibility on lawyers for payment of third parties' fees, costs and expenses where, as here, the lawyers instructed the third party on behalf of their client and made no arrangement with him to the contrary. While counsel's submission may paint with too broad a brush, as there was no other arrangement, in this case it was the lawyers' responsibility to manage the fees aspect of their instructions to Mr HR.

[20] It was fortuitous for the lawyers that Mr HR agreed to settle for, and was paid, an amount significantly less than he charged in his invoice. In the circumstances of this review, there are valid grounds for Mr CT's opinion that the lawyers' responsibility under rule 12.2 was brought to an end by payment of the agreed settlement amount.

[21] It is also appropriate to note that Mr CT took some steps to manage the situation once it came to his attention. Mr HR's point was that the steps Mr CT took were essentially too little, too late. If the lawyers had managed the fees aspect of their instructions in April, the prospects of there being a situation for either or both lawyers to manage in November would have been significantly reduced.

[22] The key factors that affect the orders that are appropriate under s 156 are the relatively high level of Ms OW's experience and direct involvement in the file. Those factors reduce, but do not extinguish, the level of Mr CT's responsibility. It is also relevant that the lawyers' conduct related only to one third party, was unintentional and inadvertent. The fact that the lawyers had many detailed interactions with Mr HR over a period of several months, during which neither of them apparently considered or made any reference to his fees, is an aggravating feature of their conduct.

Orders under s 156

[23] Section 156 sets out a range of orders that can be imposed on a lawyer who is the subject of a finding of unsatisfactory conduct, including orders that are punitive, compensatory and remedial. Mr HR does not seek compensation, and there is no other compelling reason to consider whether there may be grounds on which to make an order under s 156(1)(d).

[24] The lawyers at the review hearing, and through counsel's submissions, emphasise what they consider to be Mr HR's responsibility as a professional expert to constrain his costs to what is reasonable, and to regularly report to the lawyers. In a sense that is a diversion. As Mr CT acknowledged at the review hearing, the review is not a review of Mr HR's conduct. He is not responsible for the lawyer's conduct; that is their concern. Putting the financial costs to one side for a moment, it is clear from Mr

HR's evidence that the lawyers' conduct in this matter has caused him significant inconvenience. The consequential orders made under s 156 should address the unsatisfactory nature of the conduct.

Apology

[25] The combination of s 156(1)(c) and s 211(1)(b) enables a LCRO to order a lawyer to address his or her unsatisfactory conduct by the delivery of an apology.

[26] There is no suggestion in counsel's submissions or elsewhere that either lawyer has considered tendering an apology to Mr HR.

[27] In some cases, the value of an apology given under compulsion is questionable. Mr HR says he did not consider that all of the issues arising from his involvement with the lawyers were addressed in the settlement they reached. That was the primary motivation for him making the complaint. The finding that the lawyer's conduct was unsatisfactory validates his concern. There must be a way in which the significant inconvenience the lawyers' conduct caused to Mr HR can be meaningfully addressed.

[28] The parties have given effect to the settlement they agreed, so orders requiring them to do that, or to rectify errors or omissions, which are available under s 156(1)(a) and (h), are not appropriate. Censuring or reprimanding either lawyer provides no real redress for Mr HR. He does not seek compensation. His request that he be paid costs on review is addressed below. Mr HR would not be the recipient of any fine. The orders set out in s 156(1)(j) to (o) are not relevant.

[29] The most suitable avenue by which the unsatisfactory nature of the lawyers' conduct towards Mr HR can be addressed is by an apology. Both lawyers enjoy the status associated with being experienced senior legal professionals. It is likely that a meaningful apology from each of Mr CT and Ms OW to Mr HR would help to address the significant inconvenience their conduct caused to him. Each of them is therefore ordered to provide Mr HR with a suitably worded written apology.

Fine

[30] I have considered counsel's submission that a fine is likely to be inevitable. Having considered the functions of penalty including punishment, deterrence and reflection of condemnation or opprobrium, and all the relevant circumstances, I disagree. Apologies will suffice.

Costs

[31] Section 210 of the Act provides a LCRO with a broad discretion over costs that can be ordered on review. Costs orders are guided by the LCRO's Costs Orders Guidelines.

Costs between the parties

[32] Mr HR seeks what he describes as "nominal costs" of $12,800, calculated on the basis of the time he would otherwise have been able to devote to earning money over five days, which instead was consumed by his involvement in the complaint and review processes.

[33] The Guidelines say that the power to order costs between the parties to a review is to be exercised sparingly, and in limited circumstances. In the present matter a costs order could only be made in favour of Mr HR if there had been some improper conduct by the lawyers in the course of the review. There has been no such conduct.

[34] In the absence of any such conduct, the Guidelines say that the parties to review will generally be expected to bear the costs they incurred in being party to the review. The Guideline says it applies where the application for review was reasonable and the decision of the Standards Committee has been reversed, and the parties have acted appropriately.

[35] There is no reason to depart from the Guideline.

[36] In all the circumstances, no inter-party costs are ordered.

Costs to NZLS

[37] Counsel accepts that costs on review may be ordered against the lawyers. That is consistent with the Guideline that says costs will usually be ordered against practitioners in favour of the New Zealand Law Society where a finding of unsatisfactory conduct is made or upheld against a practitioner, and that those orders will usually relate to the costs of the Committees' inquiry, and on review.

[38] The Committee considered the materials available to it, found that no standards issues arose and dismissed the complaint. Given it was at relatively low level, there is no good reason to order costs in relation to the Committee's inquiry.

[39] Costs are generally appropriate on review where an adverse finding is made or upheld, generally to the extent of approximately half of the costs of the review. The

usual Guideline amount of costs for a straight forward hearing in person such as this is $1,200. The review of the decision in respect of Ms OW's and Mr CT's conduct was dealt with together at one hearing, so an order for costs of $1,200 is appropriate, and is made pursuant to s 210 of the Act.

Orders

[40] Within 28 days of the date of this decision:

(1) Pursuant to ss 211(1)(b) and 156(1)(c) of the Lawyers and Conveyancers Act 2006, Ms OW is ordered to tender a written apology to Mr HR for the inconvenience her conduct caused to him.

(2) Pursuant to ss 211(1)(b) and 156(1)(c) of the Lawyers and Conveyancers Act 2006, Mr CT is ordered to tender a written apology to Mr HR for the inconvenience his conduct caused to him.

(3) Pursuant to s 210 of the Lawyers and Conveyancers Act 2006, the lawyers are ordered to pay costs of $1,200 to NZLS.

DATED this 8th day of September 2015

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D Thresher
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 HR as the Applicant
Ms OW as the Respondent
Mr CT as the Respondent
Mr [X] QC as the Representative for the Respondents
Ms YS as a related person as per section 213
Standards Committee
The New Zealand Law Society