LCRO 91/2014

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

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

DECISION

Introduction

[1] This is an application for review of a decision of the [North Island] Standards Committee [X] which considered a complaint by JR (JR – the owners) against Mr SW. The Standards Committee decided that no further action on the complaint was necessary or appropriate. JR seeks a review of that decision.

Background

[2] JR was responsible for administering a body corporate which managed 12 residential units known as the [name] Apartments.

[3] The units had weathertightness issues.

[4] In November 2009 Mr SW received instructions to act for JR in relation to weathertightness claims arising from alleged defects in the design and building of the residential units. Shortly before a lengthy trial was due to start the parties reached a settlement at mediation in June 2012.

[5] Total fees rendered for the legal work involved in pursuing the weathertight claim were approximately $1,316,705 plus GST.

The Complaint and the Standards Committee Decision

[6] On 1 October 2012, JR lodged a complaint against Mr SW with the New Zealand Law Society Complaints Service.

[7] By way of preliminary comment, the complaint recorded that "this is not a complaint as to the quality of the services; notwithstanding that the outcome has left the owners considerably out of pocket".[1]

[8] JR's complaint, as detailed in its lawyer's initial correspondence, is described as follows: [2]

(a) The cost over-run; being the substantial difference between the estimates, including revised estimates given, and the actual costs rendered; and

(b) What appears to be over-zealous time recording and the rendering of invoices reflecting simply the value of time recorded by the relevant authors with no apparent recognition of the other factors that need to be addressed in Rule 9.1 of the Client Care Rules; and

(c) The litmus test being that the fees charged to the body corporate (contrary to [SW Law Firm's] advice of cost efficiency if that firm was instructed because of Mr SW having undertaken similar assignments) are in excess of fees charged on similar assignments."

[9] In comprehensive response to the complaint, Mr SW submitted that:

(a) The litigation involved a claim by 12 owners against nine defendant parties for damages of approximately $13 million.

(b) The technical, factual and legal issues were heavily contested.

(c) The claim was complex.

(d) There was no settlement offer capable of acceptance until the final mediation on 28 June 2012.

(e) Fees rendered were reasonable and commensurate with work required and outcome achieved.

(f) Estimates provided were precisely that - estimates, and excluded reporting and contingency items.

[1] [LB Law Firm] letter to New Zealand Law Society (1 October 2012) at [3].
[2] [LB Law Firm] to New Zealand Law Society (1 October 2012) at [4].

(g) Fees rendered in large part corresponded with estimates and revised estimates provided during the course of the litigation.

(h) Comprehensive reports were provided regularly to the client.

(i) Time was accurately recorded.

(j) An excellent outcome was achieved.

(k) Queries regarding accounts when raised were dealt with to the client's satisfaction.

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

- Was there a reasonable basis for exceeding the estimates?
- Were the fees fair and reasonable?
- Did Mr SW provide an incorrect costs estimate at the mediation?

[11] On completion of its inquiry, the Committee concluded that:

- Mr SW had exercised reasonable care when providing estimates.
- When considered in the round, the fees rendered were fair and reasonable in relation to the claim.
- Inquiry into the contested evidence between the parties as to the estimate of final costs provided by Mr SW at the mediation was unnecessary, as there was a sufficient basis to conclude that all of Mr SW's costs, including the final invoiced amount, were reasonable.

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

Application for Review

[13] JR filed an application to review the decision of the Standards Committee on 30 April 2014.

[14] They contended that the Standards Committee had failed to address the substance of their complaint, being allegation that:

- Invoices were rendered substantially in excess of estimates provided.

- When estimates were revised, those revised estimates were provided contemporaneously with delivery of invoices which reflected the increased estimate provided.

- An estimate was provided on 28 June 2012 for work to completion in the sum of $144,000 plus GST, and followed immediately by a final account of $299,000 (inclusive of GST).

[15] In response, Mr SW submitted that:

- He placed reliance on submissions provided to the Standards Committee.

- An experienced cost assessor had reviewed all aspects of the complaint, considered the extensive documentation and concluded that the fees rendered were fair and reasonable.

- He rejected allegation that the Standards Committee decision failed to address the complaints.

- The LCRO should exercise caution when considering a request to revisit the decision of an experienced Standards Committee.

- Properly analysed, an appraisal of the revised estimates supported conclusion that all costs were largely in line with estimates provided, the invoice of November 2011 excepted.

- An accurate summation of fees incurred to the date of the mediation was provided to the owners at the mediation.

The role of the LCRO on review

[16] The role of the Legal Complaints Review Officer (LCRO) on review is to reach his own view of the evidence before him. Where the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting his own judgement for that of the Standards Committee, without good reason.[3]

The Hearing

[17] Both parties were represented at the hearing which took place on 14 November 2014. Mr LB appeared for JR and Mr SW appeared in person.

Analysis

[18] In conducting this review, I have given careful consideration to:

[3] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [40]-[41].

- The Standards Committee decision.
- The cost assessor's report.
- Correspondence between Mr LB and Mr SW, including correspondence exchanged prior to the formal complaint being lodged.
- The parties' written and oral submissions.
- The Standards Committee file.
- LCRO decisions cited by the parties.
- All monthly reporting letters and invoices provided to JR between January 2010 and July 2012.

[19] The grounds advanced by JR for review of the Standards Committee decision, in essence, simply reiterate the initial complaints.

[20] Apart from general allegation that the Committee failed to satisfactorily address the complaints, there is little indication from the review application as to where JR consider that the Committee erred in reaching its conclusions.

[21] Mr LB emphasised that the focus of his client's complaint centred on allegation that Mr SW had consistently provided estimates which were inaccurate, and that the fees invoiced for work completed inevitably exceeded the estimates provided.

[22] He submits that both the Committee and the cost assessor failed to address his client's concern regarding the inaccuracy of the estimates provided, and argues that if proper attention had been given by the Committee and the cost assessor to those concerns, a finding of unsatisfactory conduct would inevitably have followed.

[23] He contends that Mr SW has breached his professional obligations, and in particular the rules of professional conduct which require a practitioner, when providing estimates, to inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded.

[24] Mr LB argues that Mr SW's inability to provide accurate estimate of work to be done is particularly inexplicable, when Mr SW has promoted himself to JR as a skilled practitioner with a high level of competence and experience in the management of weathertight cases.

[25] It is not satisfactory, Mr LB contends, for Mr SW to rationalise his fees consistently exceeding his estimates by recourse to argument that the litigation was

complex and constantly evolving, which resulted in him having to complete work which was unexpected and unanticipated.

[26] A practitioner promoting himself as a leading expert in the area of litigating leaky building claims should, says Mr LB, have been able to anticipate the likely scope of the litigation, anticipate the potential pitfalls and provide realistic estimates.

[27] Particular concern is raised regarding advice Mr SW is said to have provided to the JR owners at the mediation conference, at which final settlement was reached.

[28] Request was made of Mr SW to provide the owners with an estimate for his final account. This information was required for the owners to be able to realistically assess the settlement that was on the table. Before accepting any settlement proposed, they wanted to know, understandably, what their final costs would be.

[29] The owners contended Mr SW provided an estimate for his final account of around $144,000 plus GST. They say they were dismayed to receive a final account in the sum of $260,000 plus GST, that account exceeding by over $100,000 what they were quoted.

[30] Mr LB contends that inaccuracies in estimates of that magnitude are so misleading and inaccurate that the failure must amount to unsatisfactory conduct on Mr SW's part.

[31] Mr LB accepts that on occasions Mr SW provided updated estimates, but is critical of the timing. He submits that revised estimates were frequently provided contemporaneously with accounts which reflected the increased fee. This subverted, he suggests, the owners' ability to reflect on the estimate, and to provide careful and reasoned response to it. He describes this approach as providing explanation after the event.

[32] On first taking instructions, Mr SW provided an estimate of fees for work to completion. He estimated costs in the vicinity of $500,000 would be incurred. That was a substantial underestimation of the total litigation costs of $1,316,705 exclusive of GST.

[33] Whilst the total fees incurred substantially exceeded the initial estimates provided, Mr LB did not, on review, challenge the reasonableness of the fees by pursuing argument that the overall fee charged was excessive when referenced to the work completed or the outcome achieved.

[34] JR's initial complaint had alleged that there had been an over-zealous approach to time recording, and that the total fees charged were excessive when compared with fees charged in comparable litigation.

[35] Those arguments fell away on review. Mr LB's submissions focused primarily on argument relating to the estimates provided. He contended that the issue as to whether the fee charged was a fair fee was to some extent "not the point".

[36] Whilst I appreciate that Mr LB's argument focuses on the adequacy of estimates provided, I do not consider that the question as to whether the fees charged for the services provided were reasonable assumes the degree of irrelevancy that Mr LB suggests it does.

[37] The Standards Committee had before it a comprehensive cost assessor's report, prepared by Mr CQ.

[38] That report is thorough. In preparing that report, Mr CQ examined the core materials pertaining to the proceedings including the pleadings, witness briefs, expert reports, submissions and document bundles.

[39] He undertook what he describes as a "high level" review of those materials.[4]

[40] He reviewed the invoices by reference to each of the relevant factors considered under rule 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[41] Mr CQ sought further information from Mr SW as to how the solicitors working in Mr SW's office had managed the work on the file, and undertook a number of audits to check time recorded against record of work completed. He was satisfied that the time records provided accurate account of work completed.

[42] After addressing each of the factors embraced by rule 9, Mr CQ concluded that the fees charged were fair and reasonable for the services provided.[5]

[43] To support his argument that fees claimed were reasonable, Mr SW provided evidence from a practitioner, Mr YT.

[44] Mr SW made request of Mr YT to review his file, and to provide comment on a number of issues, including the complexity of the proceedings, the outcome achieved, and the reasonableness of the fees charged. Whilst I accept that Mr YT's opinion is, as Mr LB noted, simply the opinion of another practitioner, Mr YT is a practitioner who is experienced in conducting of leaky home litigation, and it is noted that he concludes

[4] Cost assessor report, 27 November 2013 at [15].
[5] Above n 4.

that the overall fees charged by Mr SW were fair and reasonable, and that the fees charged were, in his view, consistent with fees charged for similar litigation.

[45] Comparison between costs incurred in one set of litigation with those incurred in another may have some value, but to a limited extent. Each case, as Mr SW himself emphasises, has its own particular characteristics. However in its initial complaint JR advanced the comparative argument, and in so doing, sought for conclusion to be drawn that Mr SW's costs were excessive.

[46] No evidence was advanced to support that argument that fees charged in the JR litigation exceeded those charged in comparable cases. Mr SW, in a response which was unchallenged, submitted that the fees rendered in respect to the litigation which had been advanced by JR as a point of comparison, had exceeded those incurred by JR.

[47] Mr SW also provided correspondence from Mr AK, counsel who had acted for one of the defendants in the proceedings.[6]

[48] Mr AK confirmed his view that the settlement achieved by the plaintiffs was at the high end of settlements of this type, and that the fees charged by Mr SW did not present as excessive.

[49] I agree with the Committee and the cost assessor's conclusions that the total fees rendered by Mr SW were fair and reasonable.

[50] No criticism is made of the quality of legal services provided. Mr LB makes fair concession when first filing his client's complaint, that no objection was raised to the quality of the services provided.

[51] Mr SW considered the settlement to be an excellent one. Affidavits filed by the unit owners at the review hearing would indicate that the owners did not consider that the outcome was as successful as suggested by Mr SW. It would appear however, from an email forwarded on behalf of the owners to Mr SW shortly after the settlement had been concluded, that there was a degree of satisfaction with the settlement, and an acknowledgement from the owners that Mr SW and his team had done a good job. The email read: [7]

> On behalf of JR apartments, I would like to thank you and your team for your efforts over the past couple of years, which has led to an acceptable settlement of our claim. It has been a very stressful time for the owners over that period and I'm pleased to say we managed to keep fairly united through thick and thin. I also know we have a group of owners, many with strong personalities that make life interesting to work with. However

[6] FZ letter to [SW Law Firm] (1 October 2012).

[7] EH email to SW (1 July 2012).

> Thursday's settlement has taken a great load off our shoulders and we can now start looking forward. I thought you did a great job on Thursday, it's not easy to front a number of your peers by yourself, and of course we got the right result.

[52] Mr SW's senior associate, Mr OM, is also congratulated for his contribution to the "successful outcome".

[53] The focus of this review proceeds then from the stance that no complaint is pursued concerning the reasonableness of the fees charged, or the standard of representation provided. It is, as Mr LB describes it in his follow-up correspondence to the Law Society of 17 April 2013, a simple complaint that invoices rendered exceeded the estimates that had been given by an unacceptable margin.

The Estimates

[54] It is necessary to consider the obligations imposed on practitioners which arise when providing an estimate.

[55] An important objective of the Act is to provide protection for the consumers of legal services.

[56] An examination of the estimates provided is one of the factors to be taken into account when considering the reasonableness of the fee in respect of any services provided by a lawyer to a client.

[57] Rule 9.4 directs that a lawyer must, upon request, provide an estimate of fees and inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded.

[58] The Rules do not impose obligation on a practitioner to keep their fee within the scope of the estimate provided, but there is obligation on a practitioner to promptly advise their client if it becomes apparent that the estimate will be exceeded.

[59] An estimate is not a quote. It can be difficult to provide an estimate as to the likely costs involved in providing legal services, particularly in the litigation arena, where the progressing of the file can be materially affected by unanticipated events, and significantly influenced by the conduct of the other party or parties to the proceedings.

[60] An estimate is not a promise that the cost of the work will be the amount estimated. In *K.M. Young Ltd v Cosgrove* it was stated:[8]

> …the estimate was no more than an estimate and the respondent knew that the actual cost was to be based on an hourly rate. The principle that a contractor is entitled to recover the fair and reasonable value of the

[8] *K.M. Young Ltd v Cosgrove* [1963] NZLR 967 (SC) at 969.

> work done is one applicable where the price of the work to be done has not been fixed by agreement. In this case it was fixed by agreement; it was to be the hourly rate; and it seems to me that, once that hourly rate is found to be a reasonable one, that fixes the contract price.

[61] However, that case also emphasised that the person giving the estimate must do so with care. It was noted that the party giving the estimate is the expert in the services to be provided and may be expected to be relied on by the layperson.

[62] The expectation that lawyers, when providing estimates, would do so with some care was noted in LCRO 140/09:[9]

> A lawyer who gives an estimate must therefore do so with some care. It is not appropriate for a lawyer to give an estimate to a client which a lawyer knows (or ought reasonably to know) that it is likely that the fee will be greater than the estimate in the client's particular circumstances. An estimate should be the amount which work of the nature contemplated in the particular circumstances of the client is likely to cost. It is misleading to provide a figure which is the lowest it might possibly cost and suggest that this is an estimate. There is a strong and legitimate expectation by a client that if the transaction proceeds in the usual way the bill will be in the amount of the estimate, or at least close to it.

[63] The understandable degree of caution exercised by practitioners when providing estimates for likely costs of conducting complex litigation is illustrated by Mr SW's initial letter of engagement dated 16 November 2009, when he advises that he is providing an estimate, not a quote. He cautions that litigation cases are expensive, and that resolution, depending on the parties involved, can be easier or harder to achieve. He confirms that he will provide monthly reports, and will provide a milestone analysis of estimated costs for anticipated work as the litigation progresses.

[64] At first glance, the providing of an estimate for proposed litigation from commencement to settlement in a sum less than half of the total fees rendered would seemingly give indication that the practitioner had failed to exercise the necessary duty of care when providing the initial estimate.

[65] Nor is it reasonable to argue that the unexpected twists and turns in the litigation, and the raising of new and unanticipated issues, should, in itself, provide refuge for the practitioner in the face of argument that the initial estimate was so grossly exceeded, as to cast serious doubts over the legitimacy of the estimate provided.

[66] When an initial estimate is so manifestly exceeded, the practitioner must be able to identify the significant factors which contributed to the blowout in legal costs of such magnitude, and must present persuasive argument that those factors could not have been reasonably anticipated at the commencement of the proceedings.

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[9] *Hilnathort v Rhayades* LCRO 140/09 at [15].

[67] Mr LB advances fair argument that his clients placed considerable reliance on Mr SW's skill and expertise. An element of that reliance, it could be reasonably inferred, would have been expectation that Mr SW would be able to provide a reasonably accurate estimate, and that his estimate would take into account all reasonable eventualities which should have been within the contemplation of a skilled experienced practitioner, whose specialty was the litigation of these particular claims.

[68] Placing necessary caveat on the initial estimates presents as sensible and realistic, but it is reasonable to pose question as to whether an estimate provided has any validity when so manifestly exceeded.

[69] It must be reiterated that the argument is not clouded by contention that an unsatisfactory outcome was achieved, or argument that the total fees rendered were not a fair and reasonable reflection of the work that had to be done.

[70] Mr SW submits that there were issues which arose during the course of the litigation which severely impacted on the costs. He contends that a number of those matters could not have been within his reasonable contemplation at the commencement of the proceedings. He identifies as having particular significance:

- Having to provide response to unanticipated owner generated issues.
- The high level of reporting required by the owners.
- The obdurate approach adopted by the defendants and in particular their resolute denial of liability across all issues.
- The pre-trial issues required to be addressed which could not have been anticipated to have arisen.
- The addition of several defendants to the proceedings.
- The novel and untested legal issues in contest.
- The complexity of the litigation.

[71] In summary, Mr SW contends that "the JR litigation has been the most challenging and draining assignment of this type I have faced notwithstanding our experience in this area".[10]

[72] I am satisfied that Mr SW provided accurate account of the difficulties encountered in proceeding this claim, when he describes the litigation as complex, and at the high end for litigation of this type.

[10] Email SW to LB (31 August 2012) at [111].

[73] Mr CQ, after reviewing the pleadings, experts' reports and witness briefs, concluded that the litigation was both factually and legally complex, and rated the difficulty of the litigation at a high level such as to "justify the application of significant legal resource".[11]

[74] Mr YT, who had reviewed the statements of claim and opening submissions, concluded that the case was factually and legally complex, and considered that a number of the legal issues raised by the case were novel.

[75] Mr AK, who had the advantage of being directly involved in the litigation, described the proceedings as complex and difficult.[12]

[76] I am satisfied that the nature and complexity of the litigation inevitably made it difficult, even for a skilled and experienced practitioner, to predict precisely how much work would be required to bring the matter to conclusion.

[77] Whilst the fees charged in total considerably exceeded the initial estimate provided, I do not consider that Mr SW can be fairly criticised for failing to provide a more accurate estimate at commencement.

[78] His initial letter of engagement emphasised that he was providing an estimate only and not a quote, and made abundantly clear that he would be providing, as the litigation progressed, regular milestones and updated analysis of estimated costs. He resists temptation to present as emphatically certain on matters of which he is uncertain. For example, he advises that it is difficult to estimate how long would be required for a court hearing.

[79] I am satisfied that there were significant developments with the case as it evolved, and that Mr SW and his team had no option but to provide response to those matters as and when they arose.

[80] Mr LB submits that Mr SW consistently failed to provide accurate estimates.

[81] He identifies of particular concern, estimates provided for work completed during the periods:

- September 2010 to May 2011.
- June 2011 to November 2011.
- December 2011 to June 2012.

[11] Above n 4 at [32.2].
[12] AK to [SW Law Firm] (1 October 2012).

[82] He submits that the fees rendered for those periods exceeded the estimates in percentage terms, by 163 per cent, 232 per cent, and 144 per cent respectively.

[83] I have given careful attention to Mr SW's reporting letters and invoices for the relevant periods, and do not accept Mr LB's calculations as being an accurate reflection of the estimates provided.

[84] Importantly, Mr LB's calculations ignore the fact that Mr SW was, in the course of his monthly reporting to JR, providing continuous comment on the progress of the litigation, and regularly revising estimates when he considered it necessary to do so.

[85] Whilst there is obligation on a lawyer to ensure that appropriate care is taken when providing estimates, the relevant Rules do not dictate that an estimate, once given, is cast in stone. Rather, the Rules provide that the lawyer must inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded.

[86] Nor is it the case that Mr SW's estimates were consistently inaccurate. From commencement in November 2009, through to September 2010, Mr SW was reporting to his clients that all work completed was within estimate. In his report of 14 September 2010 he notes that "we are pleased to report that we are tracking well against the milestones analysis and for all stages we have completed the work within the estimate".

September 2010 – May 2011 estimate period

[87] The estimate for this billing period was provided on 8 September 2010. Costs for work through to May 2011 were estimated in the region of $200,000.

[88] On 28 February 2011, Mr SW advised the owners that an additional $90,000 of cost would be incurred for the billing period ending May 2011.

[89] Complaint is made that Mr SW provided revised estimates and then in short order, produced an account which reflected the increase, and on occasions revised the estimates after the account had been submitted.

[90] I agree that on occasions there is an element of what Mr CQ describes in his report as "catch up", but in significant part, Mr SW alerted the clients in advance of any proposed revision to the estimates.

[91] The essence of rule 9.1, is the practitioner' s obligation to keep his client informed of any significant changes to estimates provided, and this is consistent with the theme that underpins a significant component of the conduct rules, being the obligation on

practitioners to keep their clients informed not only in respect of fee issues, but on all matters pertaining to the conduct of their affairs.[13]

[92] In meeting this obligation, Mr SW cannot be faulted. His monthly reports:

- Summarised progress to date.
- Identified work that needed to be attended to immediately.
- Frequently addressed issues of long-term strategy.
- Provided analysis of progress made by reference to key milestones.
- Attached invoices for previous months work.
- Attached time records for relevant billing period.

[93] The reports were comprehensive and informing. Those reports regularly reiterated the difficulties of providing exact estimates for further work, and identified the areas of uncertainty with litigation. On numerous occasions it is reiterated that the estimates provided were not firm quotations, and would be revised if required.

[94] There is abundant evidence to support conclusion that Mr SW's clients clearly understood that fees would be charged primarily by reference to time recorded.

[95] It is difficult, in the face of the comprehensive and at times exhaustive reporting provided by Mr SW, to conclude that his clients were not thoroughly informed as to the progress being made, the work that was to be done, and the state of the costs.

[96] I agree with Mr LB that the fees rendered for the period 8 September 2010 to May 2011 significantly exceeded initial estimates. The sum exceeded, when taking into account the revised estimates provided, reflects an increase of approximately 25 per cent.

[97] Mr SW submits that the increase is explained by inclusion of contingency and reporting fees, which were specifically excluded from his estimate for the reporting period.

[98] I do not, after carefully considering the reports and invoices for the relevant period, consider that Mr SW breached his obligation to keep his clients informed. The case was evolving, he was making conscientious effort to keep his clients up to date on a raft of matters. His estimates were precisely that – estimates, and whilst Mr LB invites me to discount the significance of the Committee's conclusion that fees rendered were fair and reasonable and an accurate reflection of work done, my view is that the

[13] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 3 and 7.

additional work that frequently had to be attended to left Mr SW no option but to complete the work.

June 2011 to November 2011-estimate period

[99] The first estimate to consider for this billing period is the estimate provided on 12 July 2011.

[100] This estimate focused on the work to be completed in preparation for the judicial settlement conference set down for November 2011.

[101] The estimate notes that costs incurred in the inspection and analysis of further discovery, would depend on the volume of documents received.

[102] Mr SW submits that the significant increase of costs for this billing period (which he acknowledges exceeded the estimate provided) was the consequence of a number of factors, but is particularly explainable by reference to two matters, firstly the amount of documentation received from the defendants that demanded response, and secondly the change of strategy required as a consequence of the owners changing their instructions and electing to proceed with an earlier trial date rather than remediate the properties prior to hearing.

[103] A significant amount of the defendants' documentation was provided at late notice (early November 2011).

[104] In his reporting letter of 14 December 2012, Mr SW provided an analysis of costs incurred against cost estimates, identified areas where costs were exceeded, and provided explanation for the overruns.

[105] The arguments advanced by Mr SW by way of explanation for the cost overrun are persuasive. He was obliged to provide response to the defendants' documentation, and I accept his submission that the scope and extent of that documentation went well beyond what he could reasonably have anticipated.

[106] His 12 July estimate clearly signalled the potential for increased costs, if the defendants' documentation exceeded what was at that time within his reasonable contemplation.

[107] I also accept Mr SW's submission that the owners' decision to bring the trial date forward did, as a matter of strategy, require him and his team to prepare more comprehensively for the impending conference.

[108] But importantly, every month in his reporting letters, Mr SW advised the owners of actual costs against estimates. Mr SW continued to provide regular updates as to progress on reaching milestone targets, together with updated estimates.

[109] It is compellingly apparent, right from commencement, that Mr SW's clear and unequivocal advice to the owners was that it is difficult in litigation of this type to provide accurate estimate as to possible costs. He reiterated on numerous occasions the factors which made it difficult if not impossible to provide impenetrable estimates. He conducted the litigation with considerable focus on keeping the owners informed and was relentlessly conscientious in tracking costs.

[110] It is understandable that the owners were concerned at the escalating costs, and the November 2010 invoice prompted them to make complaint.

[111] In his reporting letter of 13 March 2012, Mr SW sought confirmation from the owners of their commitment to him progressing further work on the clear understanding that milestones and estimates would be readily reviewed, and that actual costs would continue to be based on time and attendances and reflect the work reasonably required in accordance with instructions from time to time. The letter stated: [14]

> Please confirm your agreement to the above basis for our fees moving forward. Specifically, we require your agreement that our estimates are understood to be estimates, not quotes, and that actual costs will continue to be based on our time and attendances and reflect the work reasonably required in accordance with instructions from time to time.

[112] The owners' representative (Mr EH) responded with instructions advising that the owners agreed to Mr SW preparing for the upcoming hearing, and confirming that the owners understood that Mr SW's accounts would be based on time spent on the work as follows: [15]

> My email below gives you the go ahead to prepare for the hearing. If you are asking us to agree with your estimates for this work, that is all they are, estimates, and as you say you will be billing us for the actual time spent and not the estimates. We do know how your estimates can differ from actual time spent, so I do not understand what else you are asking from us.

[113] Mr EH, in a further email despatched the following day, advised Mr SW that the Body Corporate would have problems meeting the costs from levies in the required time frame, and that there would be a need to extract the levies "as long as the overruns are justified".

[114] No evidence was advanced at review to support argument that any of the work completed by Mr SW and his team was unnecessary.

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[14] SW correspondence to JR, (13 March 2012) at 2.
[15] EH email correspondence to OM and SW, (27 March 2012).

December 2011 to June 2012-estimate period

[115] Mr LB submitted that estimates provided for the period 1 December 2011 to June 2012 (completion) were $382,000, and actual costs incurred, $551,674.00.

[116] It is correct that Mr SW provided an initial estimate of $382,000 in December 2011, however that estimate was revised on 16 February 2012, and again on 16 March 2012.

[117] Updated estimates were provided in response to requests from the owners.

[118] The revised estimate, provided on 16 February 2012, advised the owners that costs for work completed to 2 July 2012 would be in the vicinity of between $485,000-$538,000.

[119] In addition, a separate estimate was provided in February 2012, for anticipated costs to the date of a mediation which had been scheduled for 19 March 2012.

[120] The costs invoiced for the period were then very approximate to the revised estimates provided to the parties in February.

[121] The owners' complaint focused not only on concern that costs incurred for the period substantially exceeded the initial estimate, but also on allegation that Mr SW had misled them at the June conference as to the amount of his final account.

[122] The matter was settled at the June conference.

[123] During the conference, the owners made enquiry of Mr SW as to how much his final account would be. They wished to have an accurate estimate of final costs, so they could factor those costs into their decision as to whether to accept the settlement offer that was on the table.

[124] The owners contended they had met with Mr OM (Mr SW's senior associate) prior to the mediation and had sought an indication from Mr OM as to what the final costs would be. They maintain that Mr OM had indicated to them that the final wrap-up account would be in the vicinity of around $200,000.

[125] It is not contested that during the course of the June mediation the owners sought clarification from Mr SW as to how much his final account would be. During a break in proceedings, Mr SW phoned his office and spent some time clarifying with his office staff the time that was posted for work on the file to date of mediation.

[126] Three of the owners who were present at the mediation have sworn affidavits deposing to the fact that Mr SW advised them that final costs would amount to $144,000 exclusive of GST.

[127] Mr SW emphatically rejects suggestion that he advised the owners in those terms. He maintains that he gave clear indication to the owners, after making enquiry of his office, that final costs would be in the vicinity of $253,000.

[128] Mr SW advised that Mr OM would confirm he had conveyed that figure to Mr SW, and that Mr OM had given no indication to the owners at an earlier meeting of a likely estimate of fees involved in bringing the matter to conclusion.

[129] There is then a marked difference in the recollections of Mr SW and Mr OM, and the owners.

[130] The Standards Committee concluded that it was not in a position to resolve the factual conflict, but that in any event it did not consider that it was necessary to do so, as there was a sufficient basis to conclude that Mr SW's costs were reasonable.

[131] Mr CQ concluded that it was more probable than not that Mr SW did advise a figure to the owners of $235,000, that conclusion based on his assessment of the relevant time records for the relevant period, which broadly confirmed Mr SW's assessment of unbilled work in progress.

[132] I am no better placed to resolve this credibility contest, and would not do so unless I was confident that the evidence was sufficiently persuasive for me to reach fair conclusion.

[133] An adverse finding against Mr SW would amount to conclusion that Mr SW, and by association Mr OM, had deliberately misled the owners, the Law Society and the LCRO.

[134] An adverse finding against the owners would amount to conclusion that the owners had colluded to misrepresent Mr SW, in order to advance their claim.

[135] It is imperative that there be absolute certainty if findings are to be made which have potential to adversely impact on reputation.

[136] I think it highly improbable that the unit owners who attended the mediation have misrepresented their position. I consider it likely that they genuinely heard Mr SW as saying that final costs would be in the vicinity of $144,000.

[137] I think it equally unlikely that Mr SW would have misrepresented or understated his costs.

[138] The consistent message that Mr SW was conveying to his clients was that his team recorded all time spent working on the file, with expectation that he be reimbursed for his work on a time cost basis.

[139] When challenge was made to his November 2010 account, Mr SW stood firm and refused to acquiesce to request to discount his bill.

[140] Criticism was made of Mr SW that his firm's approach to time recording was over-zealous. This complaint was not upheld by the Committee, or pursued on review. A careful examination of the time records would indicate that Mr SW's team were methodical and meticulous in their timekeeping.

[141] Mr SW's time records for the June 2012 reporting period traversed no fewer than 28 pages. Clearly a significant amount of that time was accumulated prior to the mediation conference which took place on 28 July 2012.

[142] The evidence of the time records persuades me that it would have been unlikely that Mr SW would have intentionally conveyed to the owners a final figure for costs substantially below that reflected in the time records. It may well have been the case that there was a genuine misunderstanding at the conference. Mr SW may have been misheard. He may have mistakenly conveyed the wrong figure. This is of course speculative, but simply to emphasise that misunderstandings of this nature are not necessarily the product of deliberate and deceptive behaviour, but can result from genuine misunderstanding.

[143] I appreciate the owners' argument that better result may have been achieved if they had correctly understood the extent of the fees outstanding. But that argument is speculative. Mr SW argues that the defendants were totally resistant to increasing the settlement offer agreed.

Conclusion

[144] The litigation was financially draining for the owners. It took considerable emotional as well as financial toll on the owners.

[145] Cost estimates initially provided were substantially exceeded.

[146] On occasions, accounts were rendered for work completed, which were accompanied by revised estimates traversing the period of time encompassed by the account.

[147] The Standards Committee and its cost assessor concluded that fees rendered were reasonable.

[148] There is disagreement as to whether outcomes achieved were excellent (as advanced by Mr SW) or less than satisfactory (as advanced by some owners).

[149] The settlement achieved appears to have been at the “high end” for litigation of this type.

[150] The litigation was complex.

[151] Throughout the progressing of the matter, comprehensive reports were provided to the owners.

[152] From commencement, the owners were advised that fees would be charged on a time recorded basis, and that care would be taken in the providing of estimates, but estimates would be revised where appropriate.

[153] Owners were continually being advised as to the amount of costs incurred, and areas were being identified where estimates would likely need revision.

[154] A comprehensive cost assessor’s report concluded that total fees charged for the litigation were reasonable.

[155] The nature of the litigation was such that it made it difficult to provide accurate estimate of cost for some stages of the work.

[156] A significant number of estimates provided accorded with costs subsequently charged.

[157] Monthly reporting ensured that owners were aware when estimates had been exceeded.

[158] When an account was rendered which significantly exceeded the estimates provided and the owners had no prior knowledge of the increase (November 2010) satisfactory explanation was provided.

[159] Argument that the owners were unaware when costs were exceeded cannot be sustained. The high level of reporting ensured that owners were continually being apprised of their liability.

Decision

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

DATED this 27th day of March 2015

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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:

JR as the Applicant
LB as the Applicants' Representative
SW as the Respondent
[North Island] Standards Committee [X]
New Zealand Law Society