LCRO 95/2013

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

DECISION

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

Introduction

[1] Mr GI has applied to review a decision by the [City] Standards Committee [X] dated 19 March 2013, to take no further action in respect of his complaint about the conduct of his former lawyer, Mr JM.

[2] After conducting a hearing on the papers, the Committee determined to take no further action on Mr GI's complaint, pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act).

Background

[3] Beginning in approximately March 2001, Mr GI and Ms MO lived together in a relationship. They separated in January 2010. During their relationship they formed a family trust into which two properties were transferred. One of the properties became a

rental property (the rental property), and the couple lived together in the other (the family residence).

[4] The family residence was extensively renovated during the relationship, with a view to the couple seeing out their years together there.

[5] Ms MO had a significant alcohol problem. The couple separated as a result. Ms MO continued to live in the family residence, and Mr GI moved elsewhere.

[6] In an effort to try and resolve relationship property issues, Mr GI spoke to his solicitor, Mr B, who had acted for Mr GI for many years. Mr B recommended that Mr JM should be instructed, as a barrister with significant experience in acting in relationship property matters.

[7] On 10 September 2010, Mr JM provided Mr B with a written opinion outlining the options available to Mr GI. He said:

> In my view … the following actions should be taken:
>
> (a) An application for equal division of relationship property be filed in the Family Court … Contemporaneously with proceedings lodged in the High Court.
>
> …
>
> (c) [An application to remove the Family Court proceedings] to the High Court.

[8] This advice was based on the fact that the Family Court had very limited jurisdiction to deal with family trust issues, but had the exclusive jurisdiction to deal with relationship property issues.

[9] Mr JM met with Mr B and Mr GI on 22 September 2010. It was agreed that proceedings would be issued. Because of Mr JM's absence until 18 October 2010, another lawyer in his Chambers, Mr RF, was to manage matters until then.

[10] The Family Court proceedings were issued in mid-November 2010. Mr JM advised against issuing proceedings in the High Court at that stage as he considered that all matters were capable of resolution through the Family Court. Mr JM was nevertheless mindful that proceedings in the High Court might still need to be issued.

[11] The Family Court proceedings also included an application to appoint a litigation guardian to represent Ms MO. An order appointing counsel to assist was initially made, but by December 2010 that lawyer became counsel for Ms MO.

[12] The parties attended Judicial Settlement Conferences (JSC) in the Family Court throughout 2011 in an effort to resolve the property issues, including the trust ownership of the family residence and the rental property.

[13] However, settlement was not achieved. Mr GI became increasingly frustrated with the time it was taking to resolve matters, and on 20 December 2011, he terminated his retainer with Mr JM. [1]

[14] Mr JM's legal fees for representing Mr GI throughout the retainer totalled $24,482.50 plus GST and disbursements.

The complaint

[15] Mr GI lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 9 February 2012. Although lengthy, the substance of Mr GI's complaint was that:

(a) Mr JM's fees were excessive.

(b) Nothing was achieved.

(c) Mr JM did not act in Mr GI'S best interests.

[16] Mr GI sought compensation from Mr JM of $23,500. This was calculated on the basis of lost time in not progressing his case swiftly to the High Court or accepting a fixture in the Family Court.

[17] Mr GI also raised an issue as to whether Mr JM had a conflict of interest when he acted for him. This related to the fact that during the 1990s Ms MO had been invited to Mr JM's home by Mr JM's wife, on one or more social occasions.

[1] At the hearing of his application for review Mr GI indicated that he terminated his retainer with Mr JM in December 2011, after he had received a letter and invoice from Mr JM dated 9 December 2011. He does not appear to have formally notified Mr JM of that at the time, but on 20 December 2011, he asked Mr JM for a breakdown of his three invoices. Mr JM did not return to work after the Christmas break until 16 January 2012. On 25 January 2012, Mr GI told Mr JM in an email that he "no longer [had] authority to represent [Mr GI]" and he directed him to "cease all further work". No invoices were issued by Mr JM after 9 December 2011, nor any work carried out, and so for the purposes of this decision I will take 20 December 2011 as the effective end-date of the retainer.

Response

[18] Mr JM provided a similarly lengthy response to Mr GI's complaint. He maintained that his fees were fair and reasonable, and that he had represented Mr GI throughout the retainer, competently, diligently and professionally and always in Mr best interests.[2]

[19] In relation to the conflict issue, Mr JM said that he had no recollection of the times that Ms MO had apparently come to his home at his wife's invitation.

The Standards Committee decision

[20] Prior to considering the complaint and Mr JM's response to it, because the issue of fee reasonableness had been raised by Mr GI, the Committee appointed an assessor to consider that issue and provide it with a report. The assessor's report, dated 13 September 2012, was before the Committee when it considered the complaint. I deal with the substance of that report later in my decision.

[21] In its decision the Committee identified the following issues for determination:[3]

(a) Did Mr JM act in Mr GI'S best interests in progressing the case?

(b) Did Mr JM follow Mr GI's instructions and/or ought he to have filed proceedings in the High Court?

(c) Were Mr JM's fees excessive ($28,423.98 including GST)?

[22] In examining those issues, the Committee held:

(a) "[Mr JM's] file indicated that there was good communication between [him] and Mr GI and that Mr JM appeared to have acted in the best interests of Mr GI in progressing the case, at all times".[4]

(b) "There was no evidence that Mr GI instructed Mr JM not to pursue or to abandon the [JSC] process at any time".[5]

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[2] Letter Mr JM to NZLS (16 March 2012).
[3] Standards Committee decision at [14].
[4] At [22].
[5] At [28].

(c) "Taking into account the cost assessor's report, [the Committee] was satisfied that the fees charged by Mr JM appeared in all the circumstances to be fair and reasonable for the work undertaken and were not excessive for the legal services rendered to Mr GI".[6]

Application for review

[23] Mr GI filed an application to review the Committee's decision on 12 April 2013. To his application, Mr GI attached a lengthy submission (in letter form), dated 10 April 2013, setting out why he disagreed with the Committee's conclusions.

[24] Mr GI submitted that he was "badly let down by Mr JM".[7] He considers that Mr JM failed to achieve what is expected of a lawyer – to access the assistance of a judge in a timely, skilful and focussed manner.

[25] Mr GI seeks compensation from Mr JM, which includes losses caused, he submitted, as a result of matters not being earlier filed in the High Court.

[26] Mr GI submitted that "Mr JM's strategy (not to file proceedings in the High Court and to rely on securing a settlement through Ms MO's litigation guardian) was fundamentally flawed so it failed and wasted [his] precious time and money".[8]

Response by Mr JM

[27] Mr JM's response was to largely rely upon the submissions that he had made to the Committee.[9]

Nature and Scope of Review

[28] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[10]

> … 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.

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[6] At [38].
[7] Letter attached to Mr GI'S application for review at 9, [26].
[8] At 6.
[9] Letter Mr JM to this Office (30 April 2013).
[10] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

> 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.

[29] More recently, the High Court has described a review by this Office in the following way:[11]

> 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.

[30] 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.

Statutory delegation and hearing in person

[31] As the Officer with responsibility for deciding this application for review, I appointed Mr Robert Hesketh as my statutory delegate to assist me in that task.[12] As part of that delegation, on 27 April 2017, Mr Hesketh conducted a hearing at which Mr GI appeared in person together with his support person, Mr TV, and Mr JM by his counsel, Mr WY.

[32] Mr Hesketh has reported to me about the hearing and we have conferred about the application for review, and my decision.

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[11] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].
[12] Lawyers and Conveyancers Act 2006, sch 3, cl 6.

[33] I record that, having carefully read the complaint, the response to the complaint, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submissions from either party.

Analysis

[34] Mr GI emphasised the following matters at the hearing before Mr Hesketh:

(a) Mr JM failed or refused to act on Mr GI'S explicit instructions to file proceedings in the High Court. This was, submitted Mr GI, the "heart" of his complaint against Mr JM. He "waited 15 months in the wrong Court".

(b) Mr JM accomplished nothing during the 15 months of his retainer.

(c) Mr JM's fees were excessive.

[35] Mr GI submitted that if Mr JM had filed proceedings in the High Court as he advised should be done in September 2010, "we would not be here today". Implicit in this comment is Mr GI's view that matters between him and Ms MO would have been resolved quickly in the High Court.

Conflict of interest

[36] As part of his complaint and his application for review, Mr GI referred to what he considered was a conflict of interest on Mr JM's part. The conflict arose because, during the early 1990s, Ms MO had attended social gatherings at Mr JM's home. Apparently Mr JM's wife and Ms MO were then students together at law school.

[37] Ms MO mentioned this to Mr GI after he had instructed Mr JM. Mr GI raised this with Mr JM.

[38] Mr GI said that, at an early judicial conference in the Family Court, on seeing Ms MO, Mr JM said that he did not recall meeting her. Further, in his response to the application for review, Mr JM said that he had no recollection of Ms MO being at his home as she had described.

[39] During the hearing before Mr Hesketh, Mr GI indicated that he no longer wished to pursue this issue of complaint and review. He accepted that there was no reason to disbelieve Mr JM's submission that he did not recall meeting Ms MO.

[40] I will not deal with that issue any further.

Failure to follow instructions

[41] The legal issues between Mr GI and Ms MO were not complicated. The only items owned by their family trust were the two house properties. All other property – chattels, vehicles, bank accounts and superannuation (the relationship property) – were typical items of relationship property. The couple had been living together for approaching ten years, and so there were no issues of relationship duration. They had no children. They owned a dog, to which both were very attached.

[42] The couple were endeavouring to informally achieve a division of relationship property and management of the family trust and its assets after they separated. However, as is not uncommon even when the legal issues are not complicated, they were unable to reach agreement.

[43] Mr GI considers that this was because of Ms MO's issues with alcohol. He has described those issues in detail, and they are also referred to in the affidavits exchanged between parties when the matter was in the Family Court during 2011.

[44] Mr GI'S position was that Ms MO's addiction made her unreliable and erratic, and that her ability to meaningfully engage in discussion was severely diminished. For that reason he considered that lawyers needed to be involved, and he thus spoke to his solicitor Mr B, who recommended that Mr JM should be instructed.

[45] From Mr GI'S perspective, a firm and proactive approach was needed. His view was that this was the only way to bring matters to a conclusion. He is adamant that the most appropriate forum in which to achieve this was the High Court, as only that Court has jurisdiction to deal with family trust issues.

[46] Mr GI agreed with Mr JM's initial assessment that once proceedings had been issued in the High Court, the Family Court proceedings could be transferred to the High Court so that all matters could be dealt with in one fell swoop. He expected Mr JM to facilitate this.

[47] However, despite this having been discussed and, in Mr GI'S mind, agreed to during or shortly after the meeting he had with Mr JM in September 2010, by the time the retainer was terminated on 20 December 2011 the case was still before the Family

Court and had been for almost 13 months. Moreover, proceedings had not been issued in the High Court.

[48] Mr GI is adamant that he expected Mr JM to have the trust matters before the High Court promptly. He did not want to spend any more time than was necessary in the Family Court. The significant items of property were the family residence and the rental property, and because these were owned by the couple's family trust, only the High Court could make decisions about how those properties ought to be treated.

[49] Mr GI maintains that by not promptly issuing proceedings in the High Court and transferring the Family Court proceedings to that jurisdiction, Mr JM failed or refused to follow the explicit instructions he was given to do so. His complaint and application for review fixes firmly on that issue and for Mr GI this was a significant conduct breach by Mr JM.

[50] Mr GI considers that unnecessary time was spent and legal fees incurred in attending a series of what were unsuccessful JSCs in the Family Court throughout 2011.

[51] As a starting point, I note that in a letter that Mr GI had drafted to send to Ms MO's parents, dated 16 November 2010, and which he gave to Mr JM in draft form for comment, Mr GI wrote "After taking advice I decided there is good sense in placing the case before the Family Court".[13] This appears to corroborate Mr JM's position that the matter was first to be the subject of the Family Court's oversight, and that proceedings before the High Court would follow only if necessary.

[52] A further difficulty for Mr GI'S argument that he expected matters to be promptly put before the High Court, is that in an affidavit sworn by him on 31 January 2011, filed in the Family Court and served on Ms MO, he said:

> In [her affidavit Ms MO] expresses a wish to resolve property matters with me and states that she is prepared to attend a settlement conference for this purpose. I confirm that I am also prepared to attend a judicial settlement conference for this purpose.

[53] In so saying, I consider that Mr GI committed himself to, in good faith, make use of the Family Court's processes for resolving litigation without the need for a hearing, by attending a JSC in that Court.

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[13] Email Mr GI to Mr JM (14 November 2010).

[54] Although the Family Court did not have jurisdiction to deal with the couple's family trust, it is common for issues of that nature to be explored in a JSC in the Family Court. Often that will result in the parties (who are invariably trustees in their family trust) reaching agreement and recording that in a settlement deed. So concluded, the need for proceedings to be either commenced or continued in the High Court, is removed.

[55] I consider that by agreeing to the JSC process in his January 2011 affidavit, Mr GI accepted that it would provide a forum and some hope for all matters to be resolved by agreement, including the issues around the couple's family trust.

[56] I do not overlook that Mr GI referred to attending "a judicial settlement conference". It is clear that throughout 2011 there were several attempts to resolve matters through the JSC procedure. Three were convened and two proceeded, and as well there were other Registrar or judicial case management hearings.

[57] However, I do not consider that Mr GI was agreeing to attend only one JSC. My view is that his affidavit committed him to a process rather than an event, for as long as was reasonable.

[58] It is not uncommon for disputes in the Family Court to be the subject of judicial oversight short of a hearing, on more than one or even on several occasions (referred to as "events"). There will often be delays between events due to the Court registry processing paperwork, lawyers exchanging documents and the Court generally trying to manage a substantial caseload with a limited calendar. Administrative delays are part and parcel of litigation across all jurisdictions.

[59] In connection with these proceedings, the following occurred during 2011 (i.e. after Mr GI agreed to the JSC process):

(a) On 24 March 2011, the Court sent the parties a Notice of a JSC for 9 May 2011. The reason for the delay by the Court in sending that Notice appears to have been that it had lost the file. Mr JM provided a copy to the Court registry on 21 March.[14]

(b) On 9 May 2011, the JSC was adjourned as Ms MO's health prevented meaningful engagement by her. Counsel was reappointed as her litigation guardian.

[14] Mr JM's response to Mr GI'S complaint (16 March 2012) at [6].

(c) On 31 May 2011, the JSC was reconvened and the presiding judge recorded some progress between the parties. This included basic agreement that both properties were to be valued, the family residence sold and the rental property offered to Mr GI for purchase.

(d) On 16 June 2011, because the parties could not agree on how the valuations were to proceed, a Family Court Judge appointed valuers for the trust properties.

(e) A Registrar's List on 31 August 2011 monitored progress, the valuations having been completed in late July and early August.

(f) The JSC was resumed on 28 September 2011. Agreement could not be reached. The Judge directed a one-day hearing. A significant issue between Mr GI and Ms MO concerned ownership of their pet dog.

[60] By December 2011, the Family Court had not provided advice of the date for the one-day fixture.[15]

[61] I accept that although he committed himself to a JSC process in January 2011, by December of that year it was reasonable for Mr GI to be frustrated by the lack of progress towards resolution. There had been three attempts at a JSC culminating in an abandonment of that process in late-September 2011. No significant progress towards settlement was made after that, and Mr GI terminated the retainer in late December 2011.

[62] In effect, there are two blocks of time: as between 31 January 2011 and 28 September 2011 (eight months) when the JSC process broke down; and between then and 20 December 2011 (a little under three months) when the retainer was terminated.

[63] The issue is whether Mr JM bears any professional responsibility for delays within either block of time.

January-September 2011

[15] I note that on 4 January 2012 the Family Court scheduled a Registrar's List hearing to take place on 25 January 2012, and sought memoranda outlining "proposed actions to progress the case".

[64] On 6 March Mr GI wrote to Mr JM expressing concern at how long the Family Court's processes might take. He asked for an indication of "a timeline to get a hearing in the Family Court under some urgency" and noted that his own health was fragile.

[65] There were delays by the Court in organising the first of the JSCs. Although the Notice was sent in late March 2011, the date allocated by the Court for the JSC was 9 May 2011, which then became 31 May 2011 due to Ms MO's health.

[66] On 31 May 2011, significant progress appears to have been made towards reaching agreement over all issues of property – trust and relationship. There can be no reasonable quibble from Mr GI about this period of time. It was consistent with his sworn commitment to the JSC process and things must have appeared hopeful by this date.

[67] During this first block of time, and with Mr GI's instructions, Mr JM continued to try and negotiate a settlement with Ms MO's lawyer. It would appear, however, that Ms MO's instructions to her lawyer were erratic.

[68] As is standard, valuations of the family residence and the rental property were a necessary part of the process of calculation and property division. Again, as is not uncommon, the couple could not agree on how the valuations were to proceed, so the Court directed who should carry them out. The valuations were not finally available until early August. In my view this was not a delay about which Mr JM could be said to have any responsibility.

[69] Once the valuations were available, the Court allocated a time for the resumed JSC and, in early September 2011, scheduled the JSC to resume on 28 September 2011. That was an administrative step dependent upon the availability of the judge, counsel and the parties. Mr JM had no meaningful control over that, and can bear no responsibility for that delay.

[70] The second block of time occupied some 10 (or thereabouts) weeks, between the failure of the JSC at the end of September 2011, and the termination of the retainer on 20 December 2011.

[71] It is significant that on 28 September 2011, matters had reached the point where a Judge directed a hearing of the issues (excepting the family trust issues, over which the Family Court had no jurisdiction). That was a procedural line in the sand. The parties' commitment to a JSC process had come to an end by this time.

[72] The sticking-point appeared to be Ms MO, but for present purposes the issue is whether Mr JM's conduct caused or contributed to that in a way that demands a disciplinary response.

[73] Delays and an inability for parties to agree are not uncommon features in any system of dispute resolution. In that regard this case was no different to many that come before the Family Court. My assessment is that many of the delays that occurred during the JSC process were systemic, rather than attributable to Mr JM. The parties were in the hands of the Court when it came to scheduling and demands upon Court time can mean a delay of several weeks between events.

[74] The fact that the JSC process failed, in the sense that the parties could not reach agreement about the division of property, does not, in my view raise, any conduct issues on Mr JM's part. Mr GI and Ms MO had agreed to that process and it ran its course in a procedurally unremarkable way. It was for them to reach agreement, and not for their lawyers to impose one.

[75] Likewise, I regard the parties' failure to settle at or shortly after the final JSC in September 2011 as something over which Mr JM had no control.

[76] I do not consider that Mr JM failed or refused to follow any instructions from Mr GI between January and September 2011. It is clear that during this time not only was there an ongoing JSC process taking place, but Mr JM was also actively trying to engage Ms MO's lawyer in settlement discussions. I repeat my earlier observation that, following the 31 May 2011 JSC, the parties must have felt confident about resolving matters.

October-December 2011

[77] Mr JM's account of this time is that he was instructed to provide a further opinion about issuing trust proceedings in the High Court, given that the proposed hearing in the Family Court would be unable to deal with the family trust.[16]

[78] An examination of Mr JM's file reveals the following for this period:

(a) Immediately following the conclusion of the JSC, Mr JM wrote to Ms MO's lawyer to follow-up on issues raised at the JSC.

[16] Mr JM's response to Mr GI's complaint (16 March 2012), at [23].

(b) Also on 28 September 2011, Mr JM reported to both Mr GI and Mr B about the JSC, and noted that the problem appeared to be Ms MO's intransigence.

(c) On 29 September 2011, Mr GI wrote to Mr JM in connection with one of the issues that had been a significant stumbling block at the JSC.

(d) On 7 October 2011, Mr GI wrote to Mr JM thanking him "for all [his] hard work". He asked Mr JM to "push the Family Court to set up the one day hearing … as soon as possible". He noted that he "[struggled] with the long delays and nothing happening", and that "we need to plan for a High Court ratification and make it crystal clear at every opportunity … that [I have] been more than cooperative".

(e) During November 2011, acting on Mr GI'S instructions, Mr B continued to engage with Ms MO's lawyer to try and settle all issues. Those attempts were also unsuccessful. Ms MO's lawyer had described her as being very unwell.

(f) On 6 December 2011, Mr GI asked Mr JM for "any news of the Family Court hearing date".

(g) On 9 December 2011, Mr JM provided Mr B with a three-page report on the matter, including suggestions as to how to deal with the family trust. The suggested alternatives were for the independent trustee to make a decision about distribution or for the trustees to ask the High Court to divide the trust property. He noted that "if the decision is made to make an application to the High Court, that should be done now". He also noted that no real benefit would be served by combining the Family Court proceedings with any High Court proceedings, given the straight forward nature of the issues before the Family Court.

(h) On 13 December 2011, Mr B asked Mr JM "may we please hear from you on the trust issues please". He had not received Mr JM's 9 December 2011 report.

[79] Adopting, as I am obliged to do, a robust and independent approach to whether conduct issues arise out of this particular block of time, I conclude that they do not. The following matters influence that view:

(a) Mr JM promptly followed up on certain matters with Ms MO's lawyer at the conclusion of the JSC.

(b) Acting on Mr GI'S instructions, Mr B endeavoured to negotiate a settlement with Ms MO's lawyer. This failed in mid-November 2011.

(c) Mr GI did not raise any concerns with Mr JM about his representation during this time.

(d) On 9 December 2011, Mr JM provided a three-page opinion about options to progress matters.

[80] These, in my view, were standard steps. They were sanctioned by Mr GI; certainly in so far as instructing Mr B to continue settlement negotiations. As a counsel of perfection, Mr JM might have provided his opinion during November 2011, but it is difficult to see what difference this would have made. In any event, my assessment is that the short delay does not require any disciplinary response.

Failure to file proceedings in the High Court

[81] If it was Mr GI'S wish from the outset for the matter to be in the High Court, then he does not appear to have conveyed this to Mr JM, let alone instructed him to initiate proceedings there.

[82] An analysis of Mr JM's file, which includes all of the correspondence exchanged between him and Mr GI (and Mr B) bears out this conclusion.

[83] Shortly after Mr JM had filed the proceedings in the Family Court, Mr GI thanked him "for everything [he had] done so far".[17] There were later references to a hearing in the Family Court, but not to proceedings in the High Court.[18]

[84] As a further counsel of perfection, it might be said that Mr JM could have prepared, and had ready in draft form, trust proceedings to be filed in the High Court. Advice that this might be necessary was given by Mr JM in his first letter to Mr B dated 9 September 2010.

[17] Email Mr GI to Mr JM (4 December 2010).
[18] See for example, Mr GI'S emails to Mr JM (6 March & 9 April 2011).

[85] However Mr JM's subsequent advice, agreed to by Mr GI (and corroborated in his draft letter to Ms MO's parents), was that proceedings in the Family Court might be able to capture and resolve all issues.

[86] It would be speculative to conclude that drafting the proceedings and telling Ms MO that they had been drafted, would have applied leverage to the negotiations that took place during 2011.

[87] I observe that in the exchanges of correspondence variously between Mr JM, Mr GI and Mr B from September 2010 to November 2011, none contained explicit instruction to file, let alone draft, trust proceedings in the High Court. This is at odds with the submission made by Mr GI at the hearing, which was that "all [he] wanted was for the matter to be in the High Court".

[88] On 18 November 2011, some six weeks after the final and unsuccessful JSC on 28 September 2011, Mr B wrote to Mr JM and said "[Mr GI'S] instructions are to advance the matter to the High Court as soon as possible, for resolution of the trust issues .... Can we please discuss the tactical approach to this when you have some time".

[89] It was this email that prompted, approximately three weeks later, Mr JM's 9 December 2011 opinion. That short delay is unremarkable.

[90] It is also helpful to consider comments in emails from Mr GI to Mr JM (or Mr RF). These provide context when considering Mr GI'S core point, which is that all he ever wanted was a hearing before the High Court:

(a) 19 October 2010 (to Mr RF): "I noticed the papers I worked on where for the family court not high court."[19]

(b) 26 October 2010 (to Mr RF): "I am becoming concerned about our progress."

(c) 5 November 2010 (to Mr JM; thereafter all emails were sent to Mr JM: "Thank you for picking up this work. I look forward to working with you and hopefully we reach a good outcome for all."

[19] Mr RF replied to this email indicating that he was drafting documents for "all proceedings". He noted that the matter would start in the Family Court "although there is provision for proceedings to be immediately transferred to the High Court" – email Mr RF to Mr GI (19 October 2010).

(d) 4 March 2011: "What worries me is the wait we may have to get a Judicial Hearing if efforts to resolve matters directly with the four of us fail."

(e) 6 March 2011:

- "Logically it is time to settle with some dignity."
- "I would be grateful … if you could indicate to me the cost if we have to file for a hearing and some idea of timeline to get a hearing in the Family Court under some urgency."
- "I am legally entitled to a fresh start and I am asking for resolution as soon as possible ... so it is crucial we use both time and financial resources wisely."

(f) 10 May 2011: "Thank you for your hard work Monday."

(g) 13 June 2011: "As part of agreeing to attend the [JSC] I expect both parties to be properly prepared."

(h) 30 June 2011: "I agree that we should accept the morning of 8th July [for the resumed JSC]."

(i) 8 August 2011: "Another phone conference was scheduled for this week to decide next steps. Do we have a time and date for this conference?"

(j) 30 August 2011:

- "[Ms MO's lawyer] needs to understand that if we are forced to get assistance from the High Court I will be seeking costs."
- "I cannot see how anyone can justify dragging this on."

(k) 7 September 2011

- "Do not worry about the law society. I was just letting off steam."[20]
- "Thank you for your hard work."

[20] This related to a comment by Mr GI to Mr JM that he would "report" aspects of Ms MO's lawyer's conduct to the Law Society.

(l) 8 September 2011: “Thank you for sending me a copy of the 7th September letter .... It is very good.”

(m) 29 September 2011: “Happy to work towards the [Family] court deciding [a particular issue].”

(n) 7 October 2011:

- “Thank you for all your hard work.”
- “Could you please push the family court to set up a one day hearing ... as soon as possible.”
- “I struggle with the long delays and nothing happening.”
- “We need to plan for a High Court ratification.”
- “[I have] been more than cooperative.”

[91] I accept that, from time to time, Mr GI expressed frustration with the delays. However, there is no sense from his correspondence to Mr JM that he required a hearing in the High Court and that nothing less would suffice. This, however, is how Mr GI has framed his argument on review; all he ever wanted was a hearing before the High Court.

[92] As a further indication that Mr GI had not been overtly pressing Mr JM throughout the retainer for matters to be heard in the High Court, in one of his last emails to Mr JM, on 6 December 2011, Mr GI asked for “any news of the Family Court hearing date”. There was no suggestion in this email of concern that nothing was yet before the High Court.

[93] The above do not represent every email that was sent by Mr GI throughout the retainer. He sent a number in which the discussions were about settlement strategies and proposals. He was actively engaging in that process.

[94] Significantly however, none of Mr GI’s emails to Mr JM explicitly include instruction to file proceedings in the High Court.

[95] It must be the case, therefore, that Mr GI accepted Mr JM’s advice in or about November 2010, that proceedings in the Family Court might lead to all matters being resolved.

[96] I observe that, throughout the retainer, Mr JM was diligent in responding to emails from Mr GI, in writing to Ms MO's lawyer and in prompting the lawyer for responses to his correspondence, in liaising with the Court about dates, in reporting to Mr B and in copying Mr GI into that correspondence. He invariably sought Mr GI'S approval before sending significant pieces of correspondence to Ms MO's lawyer.

[97] It is clear also that Mr GI was extensively involved in drafting the pleadings, approving significant pieces of correspondence before they were sent and in participating when matters were before the Family Court. He was an engaged client, focussed on resolving his dispute with Ms MO. He gave clear instructions. He was unafraid to criticise aspects of Mr JM's drafting.[21] Indeed, in his application for review, Mr GI described himself as "an excellent client who knows what [he wants], communicates clearly and [who] pays [his] bills".[22]

[98] In criticising Mr JM's representation and the suggestion that he (Mr GI) had waited 15 months in the wrong Court, Mr GI relies significantly on the fact that the lawyer he instructed, after terminating Mr JM's retainer, had matters in the High Court swiftly.

[99] I do not accept that this reflects on Mr JM's competence or diligence. It is speculative, but had Mr GI continued to retain Mr JM, and instructed him to move matters to the High Court as Mr JM had recommended in his 9 December 2011 report, there is no reason to think that Mr JM would not have moved with similar haste. As I understand it, the proceedings in the High Court did not produce the speedy result that Mr GI had anticipated and matters were litigated there and in the Court of Appeal for some time.

[100] It is not for this Office to determine whether different strategic decisions could have been made during this retainer. Some lawyers might have approached matters differently, for example, by providing Ms MO with a draft set of proposed High Court proceedings. Some lawyers might argue that this could have provided additional leverage when Ms MO was at her most difficult to deal with, which seems to have been after the promising JSC in May 2011.

[101] But that is speculative and the issue sits squarely in the area of strategy. Strategy is informed by skill, judgment and experience. Mr JM was said by both Mr B

[21] See for example Mr GI's email to Mr JM (21 June 2011) expressing concern that a letter sent by Mr JM to Ms MO's lawyer did not deal with an aspect considered by Mr GI to be important.
[22] Letter attached to Mr GI'S application for review, at [24].

and the costs assessor to have both. It would be a remarkable conclusion for this Office to draw on these facts and say that the strategic decision not to draft and give Ms MO a set of proposed High Court proceedings was one worthy of a disciplinary response.

[102] There is no suggestion of Mr GI instructing Mr JM to do so, and, although speculative, he may have decided against doing so given the additional fees it would have generated, a topic about which he had earlier raised concern with Mr JM.

[103] Mr GI'S disappointment that there had been no resolution of matters by December 2011 is understandable. However, I do not consider that Mr JM failed or refused to issue proceedings in the High Court, or that his representation of Mr GI generally over that period of time reveals any shortcomings by him requiring a disciplinary response.

Fees

[104] Having found that there are no disciplinary issues arising out or Mr JM's representation of Mr GI, the next issue to consider is whether the fees he charged were fair and reasonable.

[105] Mr JM's retainer began in early September 2010 when Mr B asked him for an opinion about Mr GI'S legal options, a stalemate having been reached in negotiations directly with Ms MO. The retainer ended on 20 December 2011. It was a retainer of a little over 15 months.

[106] Mr GI was aware that Mr JM's hourly charge-out rate was $425. GST and disbursements were additional.

[107] Three invoices were generated during the retainer, as follows:

(a) 29 November 2010: $9,520 plus GST and disbursements (the first invoice).

(b) 28 February 2011: $4,462.50 plus GST and disbursements (the second invoice).

(c) 9 December 2011: $10,500 plus GST and disbursements (the third invoice).[23]

[108] The invoices totalled $24,482.50 plus GST and disbursements.

[109] Recorded time was 67 hours. Billed time (before the discount was applied) was 63.9 hours.

[110] The first invoice was paid in full by Mr GI, without complaint.

[111] Mr GI paid $2,793.28 towards the second invoice.

[112] The third invoice remains unpaid. Including the amount still owing on the second invoice, the balance owing by Mr GI to Mr JM is $12,603.52 plus GST.

Cost assessor's report

[113] The Standards Committee appointed a cost assessor to provide a report on the fees charged by Mr JM. That report is dated 13 September 2012.

[114] The assessor reviewed each of Mr JM's three invoices and measured them against the factors set out in rule 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules). As part of his assessment he spoke to both Mr GI and Mr JM. He also reviewed Mr JM's file.

[115] The assessor made the following comments in his report:

(a) The provision of client care information might have addressed some of the issues that were subsequently raised.

(b) There were no electronic time records.

(c) Some activities on the manual time records were undefined.

(d) The pleadings appear to be well drawn.

(e) The first invoice does not give a clear time breakdown or specify an hourly rate.

[23] This invoice was recorded as being discounted by Mr JM from $13,175 to $10,500.

(f) Mr JM is an experienced commercial and family litigation barrister. The work was well within his area of expertise.

(g) There does appear to be a difficulty with the time records.

(h) It is very hard to estimate what an accurate and reasonable fee might be (in relation to the first invoice).

(i) Some of the recording of matters (for the timesheet relating to the second invoice) is not clear at all. The time records are hard to reconcile.

(j) Looking at the file and the pleadings, it is clear that there were a good deal of matters that Mr JM was engaged with.

(k) The reasonableness (of the second invoice) depends on the accuracy of Mr JM's time records and Mr GI'S notes. I cannot reconcile these two versions.

(l) (The third invoice) is high for what was achieved.

(m) I do not think it is reasonable to charge for costing the file (2.5 hours).

(n) I find it hard to put a figure on "a fee customarily charged" in the market for these matters.

[116] In relation to the three invoices the assessor said the following:

(a) The first invoice (25.5 hours): the assessor expressed concern about discrepancies in Mr JM's timesheets as against the invoiced amount. He noted considerable work may be required to ensure accuracy when drafting and settling pleadings. He indicated it was "very hard to estimate what an accurate and reasonable fee might be".[24]

(b) The second invoice (10.5 hours): "Looking at the file and the pleadings it is clear that there were a good deal of matters that Mr JM was engaged with, culminating in the filing and service of Mr GI's affidavit sworn 31 January 2012", and "the reasonableness of the fee depends upon the

[24] Cost assessor's report (13 September 2012) at [31]–[34].

accuracy of Mr JM's time records and Mr GI's notes. I cannot reconcile these two versions".[25]

(c) The third invoice (31 hours): "Like the other fees this fee is high for what is achieved".[26]

[117] Throughout his report the assessor expresses concern about the accuracy of time records and the discrepancies between what Messrs GI and JM had said to him. The assessor indicated that the Committee might benefit from further information from Mr JM.

[118] Invited by the Committee to comment, Mr JM said the following:[27]

(a) As a barrister instructed by a solicitor he was not required by the rules to provide client care information to Mr GI.[28]

(b) At no stage did he receive any adverse comment or complaint from Mr GI about fees.

(c) The first invoice was paid by Mr GI without comment or query.

(d) His second invoice is for 10.5 hours of accurately though manually recorded work completed by him.

(e) The reference in the third invoice to "reporting and costing" is to his 9 December 2011report to Mr B setting out options, including issuing proceedings in the High Court.

(f) Mr GI was aware of his hourly rate.

(g) The time recorded for attendances is the time spent on Mr GI'S matter.

Committee's conclusions about fees

[119] The Committee dealt with the complaint about fees by noting the following:[29]

(a) Mr JM had allowed Mr GI to postpone payment of the first invoice.

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[25] At [36] and [45].
[26] At [54].
[27] Letter Mr JM to NZLS (19 November 2012).
[28] Rule 3.7(a).
[29] Standards Committee decision at [35].

(b) He allowed Mr GI to pay the second invoice by instalments.

(c) The third invoice was discounted.

(d) Mr GI did not raise any problems about the fees.

[120] The Committee also accepted Mr JM's explanation for the reference to reporting and costing in the third invoice, as relating to preparation of the report he sent Mr B on 9 December 2011.[30]

[121] The Committee took into account and accepted the cost assessor's comments" when satisfying itself "that the fees charged … appeared in all the circumstances to be fair and reasonable for the work undertaken and were not excessive for the legal services rendered…".[31]

[122] The Committee also had the benefit of Mr JM's comments about the assessor's report, which appeared to answer some of the questions that had been exercising the assessor's mind.

[123] In his application for review, Mr GI says that the work completed by Mr JM "is most certainly not worth what he claims". He considers that "solid evidence exists to show Mr JM double and triple dips". Mr GI also said that he complained to Mr B "each time [he] received an invoice". [32] If he did, then this was not apparently conveyed to Mr JM.

Discussion

[124] The assessor appeared to be influenced by the lack of client care information, and the fact that Mr JM's timekeeping records were manual rather than electronic, which (he seemed to infer) made them less reliable. There is a sense from the assessor's report that he considered those matters to be inadequacies which made the task of assessing overall reasonableness difficult.

[125] As to the lack of client care information, Mr JM correctly submits that he was not obliged to provide that to Mr B or Mr GI. The obligation to ensure that proper client care information fell to Mr B, as the solicitor who had acted for Mr GI and had

[30] At [37].
[31] At [38].
[32] Mr GI'S letter to the LCRO attached to his Application for review (10 April 2013) at 3.

instructed Mr JM. Whether that was done, is not part of this review. It is, however, not disputed that Mr GI was aware of Mr JM's hourly rate.

[126] There can be no criticism of a lawyer who chooses to keep manual rather than electronic time records. The issue is not the manner of recording; rather, it is the accuracy of what has been recorded. In that regard, the assessor noted discrepancies between recorded and billed time, although on one occasion what was billed was less than what had been recorded. The assessor also commented on general descriptions being used (e.g. "various") when recording tasks against time.

[127] I also note that the assessor referred to his difficulty in assessing an "accurate and reasonable fee". It may be a small matter, but the obligation is to render a fee that is "fair and reasonable".[33] By focussing upon "accurate", the assessor may have been diverted from his task.

[128] I also note the assessor's concern as to the accuracy of Mr JM's time records. As against that, Mr JM has said, emphatically, that the time recorded was the time spent. If that submission is accepted, then it follows that his time records were accurate.

[129] I am obliged to bring a fresh set of eyes, an open mind and to robustly form an independent view about matters on review that are contested. Having said that, I must be slow to overturn a finding made by a Standards Committee if there is no demonstrable error of process or reasoning.

[130] With that approach at the forefront, I have carefully read all of Mr JM's file, which includes the pleadings that had been filed by both parties in the Family Court. Mr JM's file includes all of the correspondence (invariably by email) that he received from Mr GI over the nearly-16 months of this retainer.

[131] I have already referred to the careful and direct way in which Mr GI approached the litigation and his instructions to Mr JM. He was a well informed client. He made his views about all aspects of the case very clear and this must have been of very great assistance to Mr JM.

[132] I have also referred to Mr JM's diligence and professionalism in managing this litigation, which includes the advice he gave Mr GI.

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[33] Rule 9, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[133] I accept Mr JM's assurance that time recorded was time spent. Applying my own judgment to that question, given the nature of this dispute and the parties to it, 67 hours of time across 15–16 months presents as entirely reasonable.

[134] However, that is not an end of the matter. Multiplying time spent by an hourly rate does not immunise a lawyer's invoice from criticism and reduction. The rules require the application of "reasonable fee factors".[34]

[135] Mr GI considers that he has spent (or has been invoiced) in excess of $25,000 and that he has nothing to show for it other than 15 wasted months.

[136] Results obtained by a lawyer are said by rule 9.1(c) to be a factor (amongst a non-exhaustive list of 13 other factors) to take into account when considering the reasonableness of a fee.

[137] That does not translate to argument that if a client does not achieve the result that they had hoped for, then any fee becomes unreasonable. Results are a factor among many.

[138] I observe that Mr JM discounted his third invoice by slightly less than $3,000.

[139] There is no doubt that Mr JM is a senior lawyer with considerable experience in the areas of law engaged by Mr GI'S retainer. It seems reasonable to conclude that the legal advice he gave Mr GI about division of property was accurate; no suggestion has been made that he got the law wrong. Likewise, his advice in September 2010 and again in December 2011 about jurisdiction and procedure in relation to the combination of family trust assets and relationship property, appears also to have been correct.

[140] Should Mr JM's fees be reduced because his client instructed him to pursue matters through the JSC process? I do not overlook that Mr GI did express concern from time to time about delays, but this is not the same as giving instructions to adopt a different approach.

[141] Because of my earlier conclusions that Mr JM did as he was instructed, and did so competently and diligently – despite there being no substantive result after 15 months – I consider that his fees for representing Mr GI throughout this time were fair and reasonable.

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[34] Rule 9.1.

[142] I agree with the Committee's approach and conclusion to that issue and cannot see any error of logic, process or the application of the rules.

Decision

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

DATED this 28TH day of June 2017

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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 GI as the Applicant
Mr JM as the Respondent
Mr WY as the Representative for the Respondent
[City] Standards Committee [X]
New Zealand Law Society