

**LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2021] NZLCRO 043

Ref: LCRO 98/2019

CONCERNING

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

AND

CONCERNING

a determination of the [Area] Standards Committee [X]

BETWEEN

EL

Applicant

AND

SV

DV

JV

Respondents

DECISION

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

Introduction

[1] Mr EL has applied to review a determination by the [Area] Standards Committee [X] dated 6 June 2019, in which the Committee made a finding of unsatisfactory conduct against him, fined and ordered him to pay costs and directed him to reduce fees charged to an estate.¹

¹ The complaint against Mr EL was originally put before the [Area] Standards Committee [Y]. During the course of its initial inquiry stages, the make-up of the Committee changed due to retirements and fresh appointments. Some recently appointed Committee members disqualified themselves from dealing with the complaint on grounds of a conflict of interest. In August 2018, the complaint was transferred to the [Area] Standards Committee [X]. For ease of reference throughout this decision I will simply refer to "the Committee" when setting out the procedural and other relevant background.

Background

[2] Mr OM died on 14 March 2013. Probate of his will was granted on 19 July 2013.

[3] The sole surviving executor and trustee of Mr OM's will was Mr EL.

[4] At his death, Mr OM had been living in a de facto relationship with Mrs PE. The two had been partners for almost 40 years, and at the time of Mr OM's death they lived in a home owned by him (the family home/[ABC]). Mrs PE also owned her own home.

[5] The family home was situated on a lifestyle block of about five acres.

[6] Mr OM's will left a life interest in the family home to Mrs PE. He also made specific bequests to two beneficiaries, and divided his residue amongst other beneficiaries.

[7] Mr OM's estate included cash, the family home and one other lifestyle property, also about five acres, and situated close to the family home (DEF). The overall value of the estate was approximately \$1.2 million.

[8] D, S and J V (the Vs) were amongst the residual beneficiaries of Mr OM's will. D was Mr OM's daughter, and S and J were two of his grandchildren.

[9] Litigation over Mr OM's estate ensued. This included claims under the Family Protection Act 1955 (FPA), and a claim by Mrs PE under the Property (Relationships) Act 1976 (PRA).

[10] As executor and trustee, Mr EL was the defendant in all of the proceedings.

[11] Mr EL instructed counsel to act in the PRA proceedings, and separate counsel to act in the FPA proceedings.

[12] Matters were finally resolved by 2018.

[13] Over the course of administering Mr OM's estate, Mr EL issued invoices totalling \$105,318.75 (GST inclusive).

The complaint

[14] The Vs lodged their complaint against Mr EL in an email to the New Zealand Law Society Complaints Service (Complaints Service) dated 3 November 2015.² They said:

- (a) The cost of administering Mr OM's estate appeared exorbitant given the work done by Mr EL.
- (b) Invoice narration was "woefully lacking" given the fees charged and the frequency of invoicing.
- (c) The administration of Mr OM's properties had not been separately itemised, causing confusion. It made settling a relationship property claim difficult. Furthermore, there was no evidence as to what has been spent in respect of each property, or why.
- (d) Copies of third-party invoices had not been provided, nor any explanation as to work carried out on Mr OM's properties.

[15] The Vs also asked for the following:

- (a) A detailed explanation of the cost of administering Mr OM's estate including Mr EL's timesheets, and a thorough narration of work carried out in relation to each of the invoices. Upon receipt of that information, a formal costs assessment may be required.
- (b) Itemisation of costs incurred in relation to each of Mr OM's properties, including supporting third-party invoices.
- (c) Annual trust account statements.

[16] The Vs subsequently added to the complaint, by raising concern that as well as acting in the administration of Mr OM's estate, Mr EL was also acting for Mrs PE. They suggested that this was a conflict of interests, because Mrs PE had issued PRA proceedings against the estate in respect of the family home.

² The Vs were joined in their complaint by a Mr TM (another of Mr OM's grandchildren). However Mr TM does not appear to have been actively involved in pursuing the complaint, and was not referred to in the Committee's determination.

Response

[17] In submissions to the Complaints Service dated 22 January 2016, Mr EL said:

- (a) He was the sole executor in the administration of Mr OM's estate.
- (b) The administration of Mr OM's estate was complex and involved four different sets of proceedings. Three were under the FPA and one under the PRA.
- (c) As a result, 21 separate files have been generated. They cover a period of nearly 3 years.
- (d) He was the sole defendant in the various actions. Separate counsel were instructed, and Mr EL acted on their advice.
- (e) Invoices were issued approximately monthly. These were invariably accompanied by either a reporting letter or memorandum "setting out the activity for the period in question". All residuary beneficiaries were kept fully informed.
- (f) Fees were based on recorded time, which has included "routine day-to-day administration", proceedings to gain possession of a property, attendances at a property to deal with maintenance issues, several attendances at another property in preparation for its sale (as well as the sale itself) and extensive attendances in connection with the litigation.
- (g) None of the claims had (at that stage) been resolved, and Mr EL was reliant upon counsel to deal with litigation.
- (h) Mr EL has not represented Mrs PE in proceedings in which she is a plaintiff. She was independently represented. Mr EL has not discussed that matter with her. Mr EL spoke to her only about maintenance issues in relation to the property she occupied.

Further comments

[18] Commenting on Mr EL's response, in a letter to the Complaints Service dated 3 March 2016 the Vs said:

- (a) The beneficiaries seemed "to receive bill after bill each month without any explanation as to what services [have been] actually provided". They said

that they were “at a loss as to why the administration of the estate [was] costing so much.”

- (b) Mr EL should not be charging fees for property maintenance as that was “an expensive and unnecessary way to deal with such matters.” His attendances on those matters are “poorly described [and] excessive and unjustified.”
- (c) It was “excessive and unnecessary” to instruct two counsel to deal with the estate litigation. One barrister could effectively have dealt with all of the litigation.
- (d) Apart from the litigation, the estate only required “general and minimal administration”. The monthly invoices were excessive and unreasonable.
- (e) It appears that Mr EL acted for Mrs PE on the sale of her home. That home was included in the estate litigation, and the estate had an interest in it.

[19] The Vs said that it was important that “the costs of administration and maintenance are explained ... in plain English with third-party invoices that match the costs incurred for each property.”

Cost assessment

[20] The Committee resolved to appoint a costs assessor to examine Mr EL’s fees, and provide a report to assist it to determine whether those fees were fair and reasonable.

[21] The costs assessor (the assessor) prepared a report dated 14 June 2018, in which he recommended “a 40% discount on [Mr EL’s] overall fees.”

[22] The assessor described this as “a somewhat unscientific approach” but said that he was driven to that recommendation because of Mr EL’s “lack of engagement [in the assessment process] and [the lack of] corroborative evidence from which to draw on for the fees.”

[23] In the course of his report, the assessor made the following comments:

- (a) There were 10 separate client-matter files.
- (b) Mr EL’s time records were handwritten. Not all timesheets were on files.

- (c) Mr EL's lack of engagement in the assessment process left the assessor "in a difficult position in working through ... information." Several requests were made for a conference with Mr EL, but no responses were received.
- (d) In relation to each of the client-matter files:
- (i) Probate and administration: the review revealed "relatively poor file management" and "the lack of clear time recording to go with the bills" and "the failure to clearly identify ... the steps that have been taken and were taken." Fees between July 2013 and June 2014 "are high". Fees between June 2014 and July 2015 "do not seem to be adequately represented by the work on the file" and "the timesheets ... do not appear to relate to the work billed." Some later invoices "appeared reasonable".
 - (ii) Sale of [123] property: the overall fee appeared to be fair, but was not backed up by time records.
 - (iii) Deed of Family Arrangement: the fee was reasonable, but there were no time records.
 - (iv) Sale of [ABC] Road: time records were scant and of no assistance. There were "several visits to the property to assist in work being done but one would question the point of Mr EL doing that at his hourly rate unless it was absolutely necessary". The fee charged of \$6,415 did not appear to be warranted for a "relatively straightforward sale and purchase."
 - (v) Summary judgment (for possession of estate property): Counsel had been briefed, and was successful. As instructing solicitor Mr EL rendered fees of \$3,000, but there was no time recording or a copy of an invoice on the file.
 - (vi) Mrs PE's PRA claim: the invoice was consistent with the time records.
 - (vii) Estate litigation: the invoices were consistent with the time records.
 - (viii) Sale of XX [DEF] Road: the invoice was consistent with the time records.³

³ In an email to the Complaints Service dated 21 June 2018, DV said that the "[123] Property" is the same as XX [DEF] Road (and is the [DEF] property).

- (ix) Tenancy of XX [DEF] Road: there was no invoice.
- (x) Sale of [456]: the invoice was consistent with the time records.⁴
- (e) Mr EL's time records were "unclear, scant and on occasion non-existent". It was difficult "to ascertain from the information provided ... the hours worked." There appeared to be inflated billing on the probate and administration file.
- (f) On some files, fees were fair and reasonable. On others the lack of time recording made that assessment difficult.
- (g) Mr EL would have been regarded as having the necessary skill to deal with the estate administration. However, "file management and file maintenance by him does not suggest an experienced practitioner [had been] engaged to deal with these matters." His hourly rate was "fair in the circumstances and [fell] within the parameters of experienced lawyers conducting work of this nature."
- (h) The matters were "moderately complex" and involved "several property transactions and claims under the FPA and PRA".

[24] The assessor also made the following observation:

The lack of information to work from [left the assessor] with a difficult assessment. There may have been significant undocumented work or requests from clients that were not recorded on the file or in the timesheets. The failure to properly invoice or to maintain trust records is also an ongoing concern Of particular concern ... are the invoices issued between 25 June 2014 and 22 July 2015. There appears to be nothing being undertaken on the files to justify fees at that level. ... [T]here may be a reason that Mr EL could supply but he has refused to engage in the process."

Parties' further comments

[25] The Committee circulated the assessor's report to the parties and invited comment.

[26] The Vs all individually indicated agreement with the assessor's recommendation.⁵

⁴ In her email dated 21 June 2018, Ms V also said that this sale related to a property on [789] Road.

⁵ See: email from JV (13 July 2018); email from DV (16 July 2018) and email from SV (16 July 2018).

[27] In an email to the Complaints Service dated 6 December 2018, which also responded to the Committee's Notice of Hearing dated 20 November 2018, Mr EL said:

- (a) The assessor "exceeded his brief" by considering events that occurred after the Vs had lodged a complaint.
- (b) Mr EL was the sole executor and trustee of Mr OM's estate. His fees are those of his trusteeship, and not as a solicitor.
- (c) "The actions of a solicitor/executor/trustee are outside the jurisdiction of the Committee ... and it cannot review the actions of a trustee even when the trustee is a lawyer."
- (d) Nevertheless, the assessor practised in another city and was "unfamiliar with the costs environment and the fees charged in [Mr EL's] location".
- (e) There was no evidence that the assessor had any particular experience in estate administration or litigation.
- (f) The assessor did not contact Mr EL to ascertain his "knowledge of the circumstances or any clarification of the issues involved", nor did he give any indication of the recommendation he made.
- (g) The administration of Mr OM's estate involved not only general administration, but also litigation (including proceedings initiated by Mr EL in relation to one of the estate properties).

[28] Mr EL made further submissions to the Committee, in an email to the Complaints Service dated 30 January 2019. He repeated his earlier submission that he was acting as a trustee, and not as a solicitor.

[29] Mr EL also pointed out that Mr OM's will authorised him to charge for his role as a trustee, and submitted that the appropriate jurisdiction in which to review a trustee's conduct, was the High Court.

Standards Committee determination

[30] The Committee identified the issues for determination as follows:⁶

- (a) Whether Mr EL was providing regulated services when he acted as trustee in the administration of Mr OM's estate.

⁶ Standards Committee determination at [10].

- (b) Whether Mr EL:
- (i) acted competently and in a timely manner consistent with the terms of his retainer and the duty to take reasonable care (as required by r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)); and
 - (ii) charged the estate a fee that was more than fair and reasonable – having regard to the observations by the cost assessor of:
 - (i) poorly maintained records and files;
 - (ii) failure to properly report to the beneficiaries;
 - (iii) rendered fees not supported by file material and/or time records (particularly invoices rendered between 25 June 2014 and 22 July 2015).
- (c) Whether Mr EL acted for more than one client in a matter when their interests did not align; specifically in acting for Mrs PE on the sale of her house, in which the estate may have had an interest and at a time when Mrs PE had issued proceedings against the estate, this being contrary to r 6.1 of the Rules.

Regulated services

[31] The Committee relied on a Review Officer's decision, in which the following was held:⁷

Where the services provided by a lawyer are services of a type that it is usual for a lawyer to provide, and they are provided in conjunction with legal work ... they are properly considered to be incidental to that work and also 'legal work'. In light of this the work of an executor/trustee who also acts as a solicitor will be regulated services.

[32] The Committee noted that Mr EL's invoices were issued in his firm's name, and described the work as being for "professional services". It also said that his actions "were not purely financial or administrative decisions routinely carried out by executors and Trustees. Rather, he managed complex estate administration amid various competing legal claims."

[33] In light of that, the Committee held that Mr EL was providing regulated services.

Competence and fees

Procedural

[34] The Committee summarised the assessor's report, and noted that he had recommended an overall 40 per-cent reduction in Mr EL's fees.

⁷ *Shrewsbury v Rothestay* LCRO 99/2009 (13 November 2009) at [31].

[35] Mr EL had challenged the assessor's report, including on the grounds that he was based in another city and did not appear to have estate administration, and related litigation, experience. Mr EL had emphasised the complexity of this particular estate administration which included litigation under the FPA and the PRA.

[36] As well, Mr EL had submitted that the assessor had not made reasonable or meaningful contact with him, and that this was procedurally unfair. Mr EL had also complained that the Committee had not given him sufficient time within which to respond to its Notice of Hearing.

[37] In considering those matters, the Committee held:⁸

- (a) although practising in a different city, the assessor was within the same region as Mr EL and was "experienced in managing legal files and billing practice." The Committee also noted that the assessor had described Mr EL's hourly rates as being reasonable;
- (b) there had been no procedural unfairness. Mr EL had been given ample opportunity to make submissions.

Competence

[38] The Committee relied on the assessor's comment relating to "a period covering almost one year" that he could see "nothing being undertaken on the file to justify fees at that level."

[39] This was held by the Committee to be a breach of r 3 of the Rules; specifically that Mr EL had failed to competently manage the estate's files.

Fees

[40] Total fees rendered by Mr EL, across 10 files and over a period of approximately three years, was \$105,318.75 (inclusive of GST).

[41] Once again the Committee referred to the assessor's report, and observed that the assessor had "addressed each of the estate's files and the factors set out in r 9.1". It said that the assessor had commented on "the relevance of each and assessing where the fees charged appeared, or did not appear to be substantiated by the material on the estate's files."

⁸ Standards Committee determination at [22].

[42] Whilst acknowledging that the assessor's recommended 40 per-cent reduction in Mr EL's overall fees was imprecise, the Committee noted that the assessor had attempted to engage with Mr EL without success, and therefore "made his best assessment of a fair and reasonable fee based on the file material available."

[43] The Committee held that the assessor "having had the benefit of reviewing the files, was best placed to gauge a reasonable fee for the work completed", and it saw no reason to depart from the assessor's recommendation of a 40 per-cent reduction in Mr EL's fees.

[44] It followed that Mr EL had charged a fee that was not fair and reasonable, and had thereby breached r 9 of the Rules.

Conflict of interest

[45] The background to this issue of complaint was that Mr EL, whilst acting in the administration of the estate, which included litigation at the suit of Mrs PE, had also acted for Mrs PE on the sale of her property. That property was one in which the estate might have had an interest.

[46] In responding to this issue of complaint Mr EL had simply said that, in relation to the litigation, Mrs PE was independently represented. In other words, he had not addressed the question of whether he had acted for her in a conveyancing transaction.

[47] Although the Committee considered that it was "highly likely Mr EL had been in a position of conflict", it noted that there was insufficient information on which to base a finding that he had breached r 6.1 of the Rules.

[48] Rather than seek further information, the Committee took into account the fact that Mr EL was elderly and no longer practiced, having retired. It considered that there was "little or no benefit to public protection" from making a finding against Mr EL.

[49] As well, the complaint itself had been lodged almost 3 years earlier and further delay was not warranted.

[50] For that reason, the Committee resolved to take no further action on that issue of complaint.

Unsatisfactory conduct?

[51] The Committee next turned consider whether Mr EL's conduct amounted to unsatisfactory conduct under s 12 of the Act. It referred to a decision of the District Court, in which the judge held:⁹

In summary, the test for whether a disciplinary [finding] is merited is a two-stage test based on first, an objective assessment of whether the practitioner departed from acceptable professional standards and secondly, whether the departure was significant enough to attract sanction for the purposes of protecting the public. ... The purpose of the disciplinary procedure is the protection of the public by the maintenance of professional standards.

[52] The Committee had concluded that Mr EL had breached rr 3 and 9 of the Rules (competence and fees), and noted the assessor's assessment that "Mr EL had significantly overcharged the estate both as to quantum and as a proportion of overall fees." This appeared to be "due to deficient file management".

[53] In those circumstances the Committee was satisfied that Mr EL had "significantly departed from acceptable standards and it was necessary to make a finding to protect the public."

[54] In particular, the Committee held that Mr EL's conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, and was also conduct that would be regarded by lawyers of good standing as being unacceptable.

[55] Accordingly, Mr EL's conduct was unsatisfactory pursuant to s 12(a)–(c) of the Act.

Penalty

[56] By way of orders and penalty, the Committee:

- (a) Ordered Mr EL to reduce his total fees to the estate (including GST and disbursements), by 40 per-cent.¹⁰
- (b) Ordered Mr EL to pay a fine of \$2,000.

⁹ *Perera v Medical Practitioners Disciplinary Tribunal* DC Whangarei MA 94/02, 10 June 2004 at [42].

¹⁰ A 40 per-cent reduction is \$42,127.50, which produces a fair and reasonable GST and disbursement inclusive fee of \$63,191.25.

- (c) Ordered Mr EL to pay costs of \$500.

Application for review

[57] Mr EL lodged his review application on 17 July 2019. He said:

- (a) The assessor did not engage with him “on a one to one basis”. At no stage did Mr EL “receive any request for information by way of explanation of any of the matters dealt with in the files which covered a large number of matters.”
- (b) He was the sole executor of Mr OM’s estate, and was not rendering legal services to anyone. He did not have a client. His relationship with the beneficiaries was fiduciary only.
- (c) There was a high level of responsibility, particularly having regard to the differences in the FPA and PRA claims. Some issues were complex.
- (d) The assessor did not “give an indication that he was going to make a general assessment which meant that he was not assessing each individual matter as would have been the proper course.” As well, the assessor did not take into account matters where no fee had been charged.
- (e) The assessor should have given Mr EL an opportunity to comment on his proposed adverse decision.
- (f) The assessor placed disproportionate emphasis on time records and did not take into account other factors involved in assessing fees.
- (g) Mr EL did not act for Mrs PE.
- (h) The proper forum for dealing with complaints about Trustees, is the High Court under the provisions of the Trustee Act.

Response

[58] The Vs indicated that they had no comment to make about Mr EL’s review application.

Nature and scope of review

[59] The nature and scope of a review have been discussed by the High Court, which said of the process of review under Lawyers and Conveyancers Act 2006 (the Act):¹¹

... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[60] More recently, the High Court has described a review by this Office in the following way:¹²

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.

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

- (a) Consider all of the available material afresh, including the Committee’s decision; and
- (b) Provide an independent opinion based on those materials.

Hearing in person

[62] Mr EL’s application for review was progressed before me at a hearing in [City 1] on 25 February 2021, at which Mr EL appeared in person.

¹¹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

¹² *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[63] Although invited to appear at the hearing, the Vs elected not to do so.

[64] I confirm that I have read the Vs' complaint, Mr EL's response to it and the Committee's determination. I have also reviewed Mr EL's client files, and have heard from him in person.

[65] There are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from any of the parties.

Discussion:

The costs assessor

[66] Throughout the complaint and review processes, Mr EL has vigorously challenged the assessor's report. His grounds are:

- (a) The assessor did not engage with him. Had the assessor done so, Mr EL would have had an opportunity to address the assessor's concerns.
- (b) The assessor practised outside the region in which Mr EL practised and was thus unfamiliar with local fee charging norms.
- (c) The assessor's conclusions were no more than off-the-cuff and were unsupported by any cogent reasoning.

[67] Mr EL said that the only communication he received from the assessor was a telephone message in which the assessor nominated a date and time for a discussion.

[68] Before me, Mr EL said that this date and time happened to be inconvenient, but that he did not inform the assessor that this was the case. He submitted that the assessor should have realised that when there was no response to his telephone message, the suggested date and time were inconvenient for Mr EL. This, according to Mr EL, should have prompted the assessor to make further contact.

[69] Mr EL describes this as a breach of natural justice: he was denied the opportunity to engage with the assessor.

[70] Mr EL's explanation for not contacting the assessor is disingenuous.

[71] Mr EL has a positive duty to cooperate with a Standards Committee's inquiry processes, which includes a fees assessment, whatever his views may be about the complaint being inquired into.¹³

[72] It is unacceptable in these circumstances to not respond to a message from an investigator appointed by a Committee to assist with its inquiry, on the basis that the silence will convey that a suggested appointment is inconvenient.

[73] I have no doubt that if Mr EL had responded to the assessor's message – even if it meant each leaving one or two further messages for the other – full opportunity would have been provided for Mr EL to address the fees complaint with the assessor. Indeed, it would have made the assessor's task significantly easier.

[74] The Committee's file is replete with instances of difficulties with the Complaints Service in making contact with or extracting a response from Mr EL. The assessor reported his difficulties, in that regard, to the Complaints Service. His report includes reference to those difficulties.¹⁴

[75] I do not for one moment think that either the Complaints Service or the assessor have exaggerated, much less fabricated, their experiences of difficulties in engaging with Mr EL.

[76] There is some support for their experiences.

[77] In *[Area] Committee [Y] v EL* the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) had this to say about Mr EL:¹⁵

[15] Because the Tribunal has received no submissions from [Mr EL] it is difficult to fully address mitigating matters....

[16] ...[H]is conduct during the course of these proceedings has in our view deprived him of what could have been mitigating features (remorse and insight) We refer to the supplementary submissions of the Standards Committee where [Mr EL's] lack of cooperation is noted as follows:

“... At no stage did [Mr EL] file any written response or affidavit evidence to the charge...”.

[78] In an earlier decision, the Tribunal had also commented upon Mr EL's lack of engagement.¹⁶

¹³ Paul Collins “Lawyers’ duty to co-operate” (2014) 844 *LawTalk* 28; see also *Parlane v New Zealand Law Society (Waikato Bay of Plenty Standards Committee No 2)* HC Hamilton CIV-2010-419-1209, 20 December 2010 at [109].

¹⁴ Set out by me at [115].

¹⁵ [2019] NZLCDT 32.

¹⁶ *[Area] Standards Committee [Y] v EL* [20XX] NZLCDT [XX] at [x].

[79] As well, a Review Officer has previously commented to similar effect.¹⁷

[80] A lawyer cannot complain that an assessor's report is flawed because they were not given an opportunity to be heard, when the lawyer has failed to engage with the process. Natural justice does not mean that a Committee's inquiry processes must be delayed until the lawyer chooses to engage. It simply means that every reasonable opportunity must be extended to a lawyer to engage.

[81] I am satisfied that those opportunities were extended to Mr EL by both the Committee and the assessor.

[82] A consequence of a failure to engage, such as I am satisfied occurred here, is that an assessor's report will necessarily include assumptions. However, it would generally be the expectation that an assessor has sufficient experience and expertise to make those assumptions.

[83] I am satisfied that the assessor had that experience and expertise, and was thus competent to make appropriate assumptions.

[84] I reject Mr EL's submissions that the assessor's report is flawed because of a breach of natural justice.

[85] Similarly, I do not accept Mr EL's submission that the assessor's report is flawed because the assessor practised in a different region and was thus unfamiliar with fee charging practises in Mr EL's locale.

[86] First, the assessor has accepted that Mr EL's charge out rate was reasonable. That is a significant acknowledgement in the context of any fees assessment. It also demonstrates familiarity by the assessor with local norms.

[87] Secondly, the assessor practised in a locale bordering on Mr EL's practise location. Indeed, the Standards Committee first tasked with inquiring into this complaint, has jurisdiction over both the assessor's and Mr EL's regions.

[88] Thirdly, there are no separate, regional estate administration jurisdictions in New Zealand. Estate administration (and related litigation) can safely be presumed to involve the same practices, rules and laws, nationally.

[89] I reject Mr EL's argument that the assessor's report is flawed because of a lack of local knowledge.

¹⁷ *FG (Review of a prosecutorial decision)* LCRO 42/2017 (3 May 2017) at [59]–[62].

Extent of fees complaint

[90] Mr EL has also raised an argument that the fees complaint ought to be limited to invoices issued by him up to the date of the V's complaint (3 November 2015). In other words, the Committee could only inquire into post-November 2015 invoices if separate complaint was made for each.

[91] I do not accept that argument.

[92] The administration of Mr OM's estate began in early 2013, and was concluded by about the end of 2018 when final distribution occurred. The lengthy administration was almost entirely due to the FPA and PRA litigation, in respect of which Mr EL (as the executor and trustee) was a defendant and thus largely reactive.

[93] It is readily apparent that by November 2015 when the Vs complained (almost three years into the administration), their concerns were longstanding and ongoing. For example, in their complaint they said:

We seek the following from [Mr EL] as a matter of urgency

- A detailed explanation as to the cost of administration ... and thorough narration of the work carried out in respect of each invoice.
- ...
- The provision of annual trust account statements

[94] As well, in commenting on Mr EL's response to their complaint, the Vs said:

We seem to receive bill after bill each month without any explanation as to what services [Mr EL] has actually provided. We are at a loss as to why the administration of the estate is costing so much ...

Our only motive in this matter is to ensure that:

1. The estate is only charged a reasonable fee for required attendances and charges.
- ...
3. The costs of administration and maintenance are explained to us in plain English...

[95] Plainly the Vs' concerns were not only with Mr EL's fees, but also with the pattern of his billing practises across all invoices issued up until the point when they lodged their complaint. They sought a change to those practises.

[96] The estate administration continued, as it had to, during the Committee's inquiry.

[97] It is clear that the Committee was being asked by the Vs to inquire into Mr EL's systemic billing practises and the fees that he charged in relation to the administration of Mr OM's estate. This included the levels of fees being charged, the basis of those fees and the format of the invoices.

[98] If the estate administration, and all of its attendant issues, was continuing, so too would Mr EL continue to issue invoices.

[99] If Mr EL's argument is to be accepted, it would mean that, with each invoice he issued, the Vs would be obliged to make a fresh complaint.

[100] This would be a triumph of form over substance, at odds with a complaints system requiring fairness, efficiency and expedition.¹⁸

Analysis

[101] I have identified the following issues for determination by me:

- (a) Was Mr EL providing regulated services when carrying out the administration of Mr OM's estate?
- (b) If so, do any issues of competence arise in relation to Mr EL's carriage of all matters in connection with the administration of Mr OM's estate? I will refer to this as the competence issue.
- (c) If Mr EL was providing regulated services, were the fees charged by Mr EL across all matters in connection with the administration of Mr OM's estate, fair and reasonable?

Preliminary observations

[102] I agree with a submission made by Mr EL, that Mr OM's estate was not straightforward, and was probably never going to be.

[103] Facially, Mr OM's will was conventional. He left a life interest in the family home to his long-term partner, made some small specific bequests and directed distribution of the balance of his estate to named residuary beneficiaries.

¹⁸ Section 123(b) of the Act.

[104] However, the following factors complicated this administration:

- (a) Mr OM's will made unequal provision for his children. Specifically, one of his sons ([Q] OM) received less than his siblings. Mr EL had given Mr OM appropriate advice about the potential ramifications of that when taking will instructions.
- (b) As it happens, after Mr OM's death, [Q] OM was found to be squatting at [DEF] and had to be evicted following proceedings initiated in the High Court by Mr EL. As well, [Q] OM brought his own FPA proceedings.
- (c) Mr EL became the only executor. The other named executor (Mr OM's accountant) had disappeared from the scene by the time that Mr OM passed away. This required enquiries as to his whereabouts by Mr EL, with the discovery that the accountant had passed away. From the perspective of probate, I accept that this generated additional work and a more particularised application for probate.
- (d) As earlier indicated, Mr OM's estate included two five acre properties, close to one another; [ABC] and [DEF]. The latter had a home on it, but that home was unoccupied until after Mr OM's death when, as described above, [Q] OM moved into it. As indicated, this necessitated proceedings in the High Court, for which counsel was instructed by Mr EL, to have [Q] OM evicted.
- (e) Both properties – land and dwellings – were in need of reasonably substantial repairs and maintenance. As well, there was livestock on each. As the sole executor and trustee it fell to Mr EL to manage that.
- (f) Mr OM also had a son with disabilities ([W] OM), who was in care and whose interests in the estate were managed by the Public Trustee. This added an additional layer of bureaucracy and administration.
- (g) Mrs PE also owned her own home. There was always potential for that to be relationship property against which Mr OM's estate might have had a claim; not to mention the potential (which became actual) for Mrs PE to initiate PRA proceedings in relation to her entitlements in the estate.
- (h) The administration of the estate was delayed by the different sets of FPA proceedings, and Mrs PE's PRA proceedings. In each case Mr EL was

the defendant. As a defendant he was largely reactive, and reliant upon the advice of counsel and the speed with which matters moved through the courts.

[105] I accept that the administration of Mr OM's estate required far greater engagement by Mr EL than would be the case in what might be described as a more routine estate administration.

[106] And because final distribution of the estate had to be delayed until all of the litigation had been resolved, Mr EL – as defendant in that litigation – was largely restricted to being reactive (apart from the proceedings initiated by him to evict Mr OM's son from the second lifestyle property, which occurred with alacrity).

Regulated services

[107] In both his response to the complaint and his review application, Mr EL argued that he was exempt from inquiry under the Act, because he was not providing regulated services throughout the administration of Mr OM's estate.

[108] Mr EL pointed to the fact that he was the sole executor and trustee under Mr OM's will, and that all of his actions came under the umbrella of the Trustee Act 1956, rather than that of a solicitor providing regulated services whose conduct is measured against the Act and relevant Regulations and Rules.

[109] At the hearing, Mr EL considerably narrowed his regulated services argument, acknowledging coverage under the Act. He submitted that from time to time, however, there was a demarcation between his role as trustee, and his actions as a solicitor providing regulated services. In relation to the former, he was not caught by the Act.

[110] Mr EL did not identify where the demarcation line was to be drawn.

[111] In *LCRO 221/2017* (8 September 2020) I noted the following:

[178] Where a lawyer acts as a trustee it can often be a difficult exercise to differentiate legal work from trustee work. A helpful point of differentiation referred to by the Court of Appeal is that it is for a lawyer to advise whether a proposal is lawful or not, but not to make a decision on the matter.¹⁹ This necessarily requires an examination of the nature of the work carried out in each role.

¹⁹ *Hansen v Young* [2004] 1 NZLR 37 (CA) at [33]–[36], referring to *Dubai Aluminium Co Ltd v Salaam* [2003] 1 All ER 97 (HL) at [134]; the principle in *Hansen* is cited in *AW v ZK* LCRO 230/2012 (28 March 2014) at [39].

[179] For example, in the context of an estate administration, this Office has held that:²⁰

... where the services provided by a lawyer are services of a type that it is usual for a lawyer to provide, and they are provided in conjunction with legal work (as defined in paragraphs (a) to (c) of the definition of that term) they are properly considered to be incidental to that work and also 'legal work'. In light of this the work of an executor/trustee who also acts as a solicitor will be regulated services.

[180] As well, and more recently, the High Court held that it is wrong to say that a trustee undertaking legal work is presumptively not providing regulated services.²¹

[181] Further, and in the context of whether the conduct of a suspended lawyer acting as a trustee, was captured by the misconduct provisions of the Act, the Court held:²²

To my mind, in light of the clear purposes of the Act and the fundamental obligations of lawyers, s 7 should be construed broadly to include practising lawyers who are undertaking "legal work" as Trustees. To hold otherwise would enable practising lawyers to avoid sanction for incompetence by simply invoking the status of trustee, even though such lawyers regularly charge for their time. Furthermore, it would be perverse to exclude a solicitor trustee from s 7 sanction because he or she was suspended at the time. The entire purpose of the suspension is to ensure that person does not perform such legal work because they are deemed unfit to practice while under that suspension.

[183] The Court also reproduced evidence it described as "particularly helpful" in explaining "the role played by Solicitor/Trustees and the common practice of a solicitor/trustee". That evidence included the following:²³

18 Where a solicitor is a trustee and is intimately involved in the affairs of his trust/clients the solicitor will generally be operating in two capacities: as a trustee, and as a professional adviser. Most trustees recognise this dual role, and provide for a professional trustee to be remunerated for his or her efforts on behalf of the trust, i.e. in the trustee role. It goes without saying that they must also be remunerated for their professional role, in the present case, for legal services provided. It will be seen that a solicitor who is a trustee may be both the client, and the legal adviser to the client.

19 In my experience few solicitors who are active trustees would make much (or any) distinction between their role as professional trustee and their role as a solicitor, and would build for time spent on the matter as though the distinction did not exist. ...

[112] To put the matter to rest, I do not accept that there is any "demarcation" in this matter as Mr EL has suggested (albeit now on a much more limited basis). It seems very

²⁰ *Shrewsbury v Rothesay* LCRO 99/2009 (13 November 2009) at [31].

²¹ *Burcher v Auckland Standards Committee 5 of the New Zealand Law Society* [2020] NZHC 43 at [49].

²² At [57].

²³ At [103].

likely that Mr OM selected Mr EL to be one of his two executors and trustees, because Mr EL was a solicitor who could apply that knowledge to the administration of the estate.

[113] I am satisfied that all of Mr EL's actions in the administration of Mr OM's estate, are properly able to be captured by inquiry under the Act.

Competence issue

[114] This was framed by the Committee as relating to Mr EL's administrative management of the files he had opened. I do not read anything in the Committee's determination as suggesting that Mr EL's legal work across the files, lacked the necessary degree of competence and diligence.

[115] The genesis of the Committee's conclusions was the assessor's report. It perhaps bears repeating some of the comments made by the assessor:

File 35: A review of the files on the whole indicated relatively poor management and on some files the lack of clear time recording to go with the bills and the failure to clearly identify to the client the steps that have been and were taken in relation to the property.

The lack of information on the files and the failure by Mr EL to engage in the process has left me in a difficult position in working through the information to make a best assessment of fair value.

...

The fees from 25 June 2014 – 26 July 2015 do not seem to be adequately represented by the work on the file. The timesheets that are included on this file do not appear to relate to the work billed. It is difficult as the costs assessor to get a true understanding if there was other work undertaken given the poor time recording records and the poor file management.

...

File 36 ... The fee overall appears to be fair in the circumstances though again is not backed up by the time recording records nor is it clear from the file whether other elements have been included in the bill.

...

[116] There were similar comments in relation to other files looked at by the assessor.

[117] The Committee's brief discussion and conclusions about this issue were:

[23] [T]he Committee considered whether Mr EL had breached r 3 of the Rules by failing to act competently and with reasonable care. It noted Mr EL's files could not be reconciled with a significant portion of the work allegedly undertaken or the fees charged. In particular it noted [the assessor's] comment that for a period covering almost one year, he could see "nothing being undertaken on the file to justify fees at that level." Additionally,

Mr EL's submissions in response to these findings did not provide any meaningful [rebuttal] to the [assessor's] conclusions.

[24] For the reasons above, the Committee was satisfied Mr EL had failed to competently manage the Estate's files and had breached r 3 of the Rules.

[118] I have also had the benefit of reviewing Mr EL's client files. I should add however that Mr EL provided this Office with some files that the assessor does not appear to have considered.

[119] Mr EL opened a total of 18 files during the administration of this estate, and allocated separate file or matter numbers to each. In addition, there were two folders ("OM Estate" and "Family Protection / Relationship Property") without file or matter numbers.

[120] Some file folders appear only to be for storing documents. A small number have very few documents on them. This is despite them having a file or matter number allocated to them.

[121] There appears to be a double-up of files in relation to [Q] OM's FPA proceedings (Files 43 and 45). File 45 itself, has a single omnibus invoice on it, which relates to four other matters: "General Administration", "[DEF]", "[ABC]" and "[Mrs PE's] and [W]'s and [Q]'s Claims".

[122] Not all files have invoices on them. The invoices themselves have scant narrations. Mr EL said that each was generally accompanied by a reporting letter or memorandum, which essentially provided the narration for the invoice. Not all could be located.

[123] Time records, such as existed, were handwritten.

[124] Mr EL's rationale for opening so many files was that different issues arose requiring discrete attendances.

[125] It is not for me to say whether it is more efficient to keep one master-file with everything maintained strictly seriatim; or whether it is more efficient to have separate files for each issue as it arose.

[126] Whatever system a lawyer chooses to apply, there must be clarity, order, clear and unambiguous time records and billing which shows a connection with work on the file.

[127] I agree with the assessor's descriptions, set out by me above at [115].

[128] Despite poring over Mr EL's files, I have had considerable difficulty in gaining a comprehensive, let alone clear, picture of work relating to particular files.

[129] Perhaps the best example of that is File 45 – ostensibly dealing with [Q] OM's FPA claim (as was File 41) – but which included an omnibus invoice for unrelated work in other areas of the estate administration.

[130] In short, many of the files were in a muddle.

[131] Whilst I do not doubt that Mr EL carried out legal work in connection with all of the issues for which he opened separate files, there is no cohesive and ordered management of the physical files, and there is considerable duplication.

[132] As indicated, the Committee came to a similar conclusion and held that the failure to competently manage the files (that is to say, the physical files) amounted to a breach of r 3 of the Rules.

[133] In summary, r 3 of the Rules requires a lawyer to “act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.”

[134] I have reservations as to whether it could be said that Mr EL failed to act in a timely manner. Rule 3 requires the combination of competence and timeliness.

[135] For myself, I would categorise Mr EL's management of his physical files as putting him in breach of s 12(b) of the Act. In particular, that his management of the physical estate administration files would be regarded by lawyers of good standing as being unacceptable.

Fair and reasonable fees

[136] I respectfully adopt the tables of invoices issued for most of the files, prepared by the Complaints Service. It is largely consistent with my own review of those files.

[137] For convenience also, I attach as a Schedule to this decision a table I have prepared which lists all of the files opened by Mr EL in the administration of this estate. I have also briefly noted the assessor's comments about fees charged on each of the files to which he had access.

[138] It will be seen from the table that there were a number of files opened by Mr EL which were not seen and assessed by the assessor.

[139] Mr EL said that he gave all of his files to the Complaints Service for delivery to the assessor. Upon completion of the Committee's inquiry the files were returned to Mr EL. Once Mr EL's review application had been lodged, a Ministry of Justice employee visited Mr EL at his home, on behalf of this Office, and uplifted all of Mr EL's estate administration files.

[140] Delivered to this Office were more files than were delivered to the assessor.

[141] There is little point in speculating as to how that arose. Either Mr EL did not deliver a full set of files to the Complaints Service; or, he did and the Complaints Service did not deliver a full set to the assessor.

[142] Little turns on it.

[143] Consistent with my difficulty in reconciling information across all of Mr EL's files, I have calculated fees inclusive of GST and disbursements as amounting to \$102,862.50. In his report, the assessor had calculated gross fees of \$105,318.75.

[144] The difference between the two amounts is approximately \$2,500. I regard this as a relatively inconsequential amount in relation to the overall fees charged, and it does not affect the conclusion I have come to about Mr EL's legal fees.

[145] It would appear from the assessor's approach, that because of the lack of input from Mr EL, he was forced to adopt what he described as "a somewhat unscientific approach", and recommend a 40 per-cent reduction of the overall fees (i.e. \$105,000 [approximately]). This translated to a reduction of \$42,127.50, meaning that the assessor considered that a fair and reasonable, GST and disbursement inclusive fee for these two files was \$63,191.25.

[146] I have no difficulty with a costs assessor, faced with the task in which there has been virtually no input by the lawyer complained about, having to exercise judgement (based on skill and experience) and come to an overall conclusion about fees.

[147] I would not necessarily diminish that approach by describing it as "unscientific". It is an assessment made on the basis of an analysis of physical files informed by years of practice experience and knowledge of the relevant area of the law. It is the classic exercise of judgement in which all decision-makers engage.²⁴

²⁴ I acknowledge, of course, that the assessor was not the decision-maker. He was expressing an opinion for the assistance of the Standards Committee, but adopting the classic analysis and conclusion approach.

[148] However, where I part company with the assessor is the application of a 40 per-cent discount to the total fees charged. The difficulty that I have with this approach, is that it includes fees which he assessed as being fair and reasonable.

[149] Having assessed particular fees as fair and reasonable, in my view they should be removed from the equation when applying a reduction to fees assessed as being excessive.

[150] The assessor upheld fees totalling \$12,587.50. He did not assess fees totalling \$14,375. He deemed excessive, fees totalling \$75,900.

[151] As a starting point therefore any reduction in fees on the basis that they are excessive, may only be applied to the figure of \$75,900. I deal further below with the assessor's application of a 40 per-cent reduction.

[152] Before doing so, it is necessary for me to conduct, in effect, a first-instance assessment of the fees not considered by the assessor, totalling \$14,375.

[153] Those fees were incurred in relation to File 41 (the High Court proceedings to evict [Q] OM from one of the estate properties [DEF]), File 45 ([Q] OM's FPA proceedings) and File 56 ("Distribution").

File 41 (including "OM Estate" file)

[154] As to File 41, the assessor reviewed this file, including the invoice, and simply noted that:

Mr EL rendered fees as the instructing solicitor for \$3000. There is no time recording on the file and it is difficult to see what steps were taken. There is no invoice on the file and no time recording on the file.

[155] Perhaps implicit in these comments is the opinion that these fees were excessive.

[156] File 41 travels with an unnumbered file folder described on the cover as "OM Estate". In short, both files deal with the one matter.

[157] In assessing both files, as I have done, it is plain that the bulk of the heavy lifting was carried by counsel instructed. Mr EL's input was relatively minimal, as is evident by the paucity of correspondence or file notes.

[158] A gross fee of \$3,025, without disbursements, indicates GST exclusive fees of \$2,630.43. Based solely on time and adopting Mr EL's hourly rate of \$450, this represents 5.85 hours of his time.

[159] I find it difficult to see how Mr EL, as the instructing solicitor who left the carriage of this matter almost entirely to counsel, could also have incurred almost 6 hours of time. In conventional "billable hours" terms, this is the equivalent of a full day.

[160] The lack of any information – such as correspondence and file notes – to corroborate that degree of engagement in the matter, leads me to conclude that these fees were excessive. This is a breach of r 9 of the Rules.

[161] In my view, and based upon the information before me, a fair and reasonable fee would be in the region of between two and three hours.

[162] Accordingly, pursuant to s 156(1)(e) of the Act, I order Mr EL to reduce the fees charged in relation to File 41 (and the associated "OM Estate" file), to \$1,125 plus GST, giving a gross fee of \$1,293.75.

File 45

[163] Files 43 and 45 are described as being "Claim by [Q] OM" and "[Q's] FP claim" respectively. This is an obvious reference to the FPA proceedings brought against his father's estate by [Q] OM.

[164] There is no invoice on File 43, and the only invoice on File 45 is an omnibus invoice which includes work relating to other estate issues, as follows:

- (a) "General Administration", which I take to relate to work associated with File 35 ("Probate and Administration"). Fees charged on File 35 were \$69,485 plus GST. Fees charged on File 45 for this work were \$2,500 plus GST.
- (b) "[DEF]", which I take to relate to Files 48 and 49 (and possibly File 52). The assessor found that fees charged on File 48 were fair and reasonable. There was no invoice on File 49. Fees charged on File 45 for this work were \$950 plus GST.
- (c) "[ABC]", which I take to relate to Files 39 and 40 (and possibly File 46). The assessor found that fees charged on File 39 were excessive (\$6,415). There was no invoice on File 40. Fees charged on File 45 for this work were \$1,250 plus GST.

- (d) “[Mrs PE’s] and [W]’s and [Q]’s claims”. Mrs PE’s claim would appear to be captured by File 44 and an unnumbered file called “Family Protection / Relationship Property”. [W]’s claim relates to File 42. [Q]’s claim is obviously a reference to Files 43, and 45 itself. Fees charged on File 45 for these three pieces of legal work were \$1,950 plus GST.

[165] Despite there being two separate files dealing with [Q] OM’s FPA proceedings, it would appear to be the case that the only fees charged by Mr EL in relation to that litigation, was a portion of \$1,950 plus GST.

[166] There is no indication as to the individual fee components for the global fee of \$1,950 for those three matters. It is impossible for me to tell from the files themselves, the actual apportionment.

[167] Taking a pragmatic approach, I conclude that the fee of \$1,950 is made up in equal thirds of the three matters to which that part of the invoice relates.

[168] That means that Mr EL charged the estate fees in relation to [Q] OM’s FPA proceedings, in the GST exclusive amount of \$650. This represents around 1.5 hours of Mr EL’s time.

[169] Mr EL instructed counsel in relation to this litigation. I accept that there would have been more consultation with counsel required in this litigation than in relation to the proceedings Mr EL commenced to have [Q] OM evicted from [DEF].

[170] The FPA proceedings involved Mr EL more intimately because, as trustee of the estate, he was required to make the decision about how to respond to that litigation, and the terms on which it was ultimately settled.

[171] For that reason, I am prepared to accept that the fees charged, as found by me above at [168], are fair and reasonable.

[172] I deal further below with those parts of the invoice on File 45 relating to other matters (albeit matters in respect of which separate files were opened).

File 56

[173] This file is called “Distribution”. It contains very little material. It was opened by Mr EL in May 2017, and I assume that it was opened by him in anticipation of all of the litigation being settled, thus enabling final distribution to take place.

[174] Fees charged were \$1,457.50. To the extent that this represents actual legal work involved in attending to distribution, towards final distribution, this is a little under three hours of Mr EL's time.

[175] However, it is difficult to know whether some of this work was captured by the invoice for File 35 ("Probate and Administration"). Conventionally perhaps, a file such as File 35 might include legal work associated with distributions and final distribution.

[176] Because of the seemingly haphazard approach Mr EL adopted to issuing invoices for legal work associated with File 35, together with the lack of any evidence of substantive legal work having been carried out on File 56, I am driven to the conclusion that these fees duplicate work done on File 35 which were invoiced directly from that file.

[177] It follows that these fees are excessive, and that this is a breach of r 9 of the Rules.

[178] I order Mr EL to cancel the invoice for fees charged on File 56, pursuant to s 156(1)(f) of the Act.

Balance of fees charged on File 45

[179] Included in fees charged by Mr EL, but not considered by the assessor, were those included on the invoice located on File 45 being "General Administration" (\$2,500), "[DEF]" (\$950) and "[ABC]" (\$1,250), all exclusive of GST.

[180] Consistent with most of the numbered files, File 45 contains little useful information. It is difficult to understand why an omnibus invoice on that file should include attendances in matters for which other files had been opened and allocated a file or matter number.

"General Administration"

[181] It would seem to me that work described as being "General Administration", for which a fee of \$2,500 plus GST is charged on the File 45 invoice, must relate to work of the type that should be found on File 35 ("Probate and Administration"), and invoiced from that file.

[182] Therefore, I regard this fee as being a duplication of the fees charged on File 35. Accordingly, it is excessive, and this is a breach of r 9 of the Rules.

[183] I order Mr EL to cancel that part of the invoice for fees charged on File 45 relating to "General Administration" (\$2,500 plus GST), pursuant to s 156(1)(f) of the Act.

[DEF]

[184] There are two files (48 and 49) bearing the description "[DEF]". This is obviously one of the two estate properties. In relation to the sale of that property (File 48), the assessor found that the fees charged were fair and reasonable.

[185] Yet, File 45 includes fees for \$950 plus GST in relation to this property.

[186] File 49, opened in relation to a tenancy at the property, does not include an invoice. However, I accept that Mr EL carried out legal work on behalf of the estate, in connection with a tenancy at that property. My understanding is that File 46 ([HH] Services) is also connected with this tenancy. There is no invoice on File 46.

[187] Although I would have expected to see an invoice relating to the tenancy related legal work on the corresponding file (File 49), I am prepared to accept that the \$950 fee included in the invoice on File 45, relates to those attendances.

[188] This represents roughly 2 hours of Mr EL's time, and I can see no reason to disallow that.

[ABC]

[189] On the File 45 invoice there is a reference to "[ABC]", being the family home, and in respect of which fees of \$1,250 plus GST have been charged.

[190] There are two files (39 and 40) which refer to [ABC]. File 39 is apparently a sale file. The assessor found those fees to be excessive.

[191] File 40 is described as "[ABC] House Fund". There is no invoice on this file. It may be that File 51 also relates to this property – this is described as "Release of Land Covenant". There is no invoice on File 51.

[192] It is, in fact, impossible for me to discern what the reference to "[ABC]" relates to on the omnibus invoice on File 45. In those circumstances, I cannot say that those fees are fair and reasonable.

[193] This too is a breach of r 9 of the Rules.

[194] I order Mr EL to cancel that part of the invoice for fees charged on File 45 relating to “[ABC]” (\$1,250 plus GST), pursuant to s 156(1)(f) of the Act.

Other

[195] Finally, in relation to the one fee charged of \$1,950 on the File 45 omnibus invoice for “[Mrs PE’s] and [W]’s and [Q]’s claims”, above at [171] I found that the one third portion of that relating to [Q] OM’s FPA proceedings, is fair and reasonable.

[196] Mrs PE’s PRA proceedings were captured by File 50, and presumably also part of an unnumbered file (Family Protection / Relationship Property). Neither file has an invoice.

[197] I infer therefore that Mr EL’s fees for attendances in relation to that litigation were included in the File 45 invoice.

[198] At [167] above, I apportioned one-third for each of Mrs PE’s PRA proceedings, [W] OM’s interests and [Q] OM’s FPA proceedings for the total fee shown of \$1,950 plus GST.

[199] This gives an individual GST exclusive fee on each matter, of \$650 or around 1.5 hours of Mr EL’s time on each matter.

[200] I have little hesitation in accepting that Mr EL would have spent at least 1.5 hours on each of Mrs PE’s PRA proceedings, and dealing with [W] OM’s interests in the estate through the Public Trustee.

Conclusion

[201] In conclusion, in relation to the omnibus invoice on File 45, I find that fees represented on that invoice for “General Administration” and “[ABC]” are excessive, in breach of r 9 of the Rules.

[202] This is a breach of r 9 of the Rules.

[203] I have directed Mr EL to cancel his fees relating to those matters as they appear on the omnibus invoice on File 45.

The assessor's 40 per-cent reduction

[204] As I have explained above, if a reduction is to be applied to the fees, then this may only relate to fees found to be excessive. Fees found to be fair and reasonable, self-evidently, should not be subject to any reduction.

[205] I conclude that the assessor was wrong to recommend applying a 40 per-cent reduction of the total of the fees charged by Mr EL, and the Committee was wrong to adopt that recommendation.

[206] Nevertheless, I must now turn to consider whether the Committee was right to conclude that a significant portion of the fees charged by Mr EL, were excessive. Mr EL argues that all fees charged were fair and reasonable.

[207] The assessor concluded that fees charged on File 35 ("Probate and Administration") and File 39 ("[ABC]"), were excessive. The total amount across both files is \$75,900.

File 35

[208] The assessor's view was that invoices issued in the latter half of July 2014, totalling \$15,260, could not be reconciled with legal work carried out on the file. He also referred to fees between July 2013 and June 2014 as being "high".

[209] Generally, the assessor referred to a lack of clear time recording and no correlation between timesheets (such as they existed) and work billed.

[210] The assessor did say that invoices issued between August 2015 and December 2016, "appear reasonable".

File 39

[211] In simple terms, the assessor concluded that the fees charged (\$6,415) were excessive for a "relatively straightforward sale and purchase."

Conclusions about Files 35 and 39 and the assessor's 40 per-cent reduction

[212] Unlike the assessor, with whom Mr EL chose not to engage, I had the benefit of Mr EL appearing before me.

[213] In his submissions, Mr EL emphasised the difficulties with the administration of this estate, already referred to by me above at [104].

[214] Mr EL referred to the “significant amount of work” that he did across all aspects of the administration of this estate. He described the work in connection with the sale of both of the estate properties, as being complicated, although the transactional aspects of the sales themselves were reasonably straightforward. The complications included the state of the properties, the need for maintenance and repairs and the legal steps necessary to evict [W] OM.

[215] Mr EL said that Mrs PE, despite being Mr OM’s partner for almost 40 years, had little knowledge about day-to-day matters such as insurance for the properties and so on.

[216] Mr EL emphasised the fact that, until he retired, he had been practising since approximately 1964 and that a significant component of his legal practice since then involved the administration of estates. He said that in relation to Mr OM’s estate, he was conscious of his “extra responsibility and liability” as trustee, under the Trustee Act 1956.

[217] He submitted that there is never any “clear pattern” as to how to cost an estate file. He described his system for doing so in the following terms. For the billing period in question he would look at the file and assess what had happened, ascribing to those events descriptions of “little”, “routine”, “medium” or “important”. Having given the billing period this weighting, Mr EL said that he then looked at the time spent but only as a factor, not as the determinative factor.

[218] Dealing with the assessor’s report, Mr EL submitted that it was a “gut feeling” rather than a reasoned, expert assessment. He submitted that the assessor had made no allowance for Mr EL’s time, skill and experience as a trustee.

[219] Despite Mr EL’s articulate submissions, I am nevertheless left in the same position as the assessor.

[220] Boiled down, Mr EL’s submissions were to the effect that he spent a lot of time dealing with this estate administration, across a number of different issues and over a period of at least five years.

[221] I do not doubt that Mr EL brought diligence to the administration of this estate. He instructed counsel when necessary, and ensured that the necessary transactional aspects of the administration were completed without incident.

[222] The difficulty is that the physical files do not support Mr EL’s submission of extensive, complicated and diverse attendances.

[223] Earlier in my decision, I described many of those files as being muddled and inconclusive. I have found that the degree of muddling to amount to conduct that would be regarded by lawyers of good standing as being unacceptable.

[224] Because of that, I am satisfied that in relation to Files 35 and 39, Mr EL charged fees that were excessive and that this was a breach of r 9 of the Rules.

[225] The lack of transparency associated with the state of affairs, together with the fact that Mr EL does appear to have duplicated fees that he has charged, leaves me in much the same position as the assessor (and the Committee), of trying to determine what a fair and reasonable fee would be.

[226] The outcome is necessarily arbitrary.

[227] Nevertheless, having heard from Mr EL in person, I am prepared to extend him more latitude than the assessor. In saying that, I am not to be seen as being critical of the assessor. He did not have the benefit of Mr EL's input because of the latter's arrogant approach to the Committee's inquiry.

[228] For example, I do not necessarily accept the assessor's implied description of the application for probate as being straightforward. It was not, due largely to the uncertainty about the second executor's whereabouts, and discovery that he had passed away.

[229] Moreover, I am not necessarily persuaded that the sales of both of the estate properties could be described as "relatively straightforward". As transactions, that may have been the case, but a reasonable amount of work was required to get the properties to the point of a smooth sale and purchase, and this fell to Mr EL as the executor and trustee.

[230] The Committee placed considerable weight on the assessor's report, and said that he "was best placed to gauge a reasonable fee for the work completed." It said that "it saw no reason to depart from the recommendation of a 40 per-cent reduction."²⁵

[231] Whereas the assessor considered that a 40 per-cent reduction was justified, I consider that a 30 per-cent reduction is more appropriate, for the reasons set out above.

[232] That reduction is to be applied to the fees of \$75,900 charged on Files 35 and 39. The amount of the reduction is \$22,770.00. This results in a fair and reasonable GST and disbursement inclusive fee of \$53,130.

²⁵ Standards Committee determination at [26].

[233] Pursuant to s 156(1)(f) of the Act I order Mr EL to reduce his fees to the Estate of Mr OM in relation to files 35 and 39 to the GST and disbursement inclusive amount of \$53,130.

Penalty and orders

[234] As well as directing Mr EL to reduce his legal fees, the Committee ordered him to pay a fine of \$2,000 and costs to the New Zealand Law Society of \$500.²⁶

[235] In fixing the level of fine, the Committee took the following into account:

- (a) The maximum available fine of \$15,000.
- (b) The importance of maintaining standards of service in the legal profession.
- (c) The importance of the reputation of the legal profession.
- (d) Mr EL's previous finding of unsatisfactory conduct.

[236] The Committee said that the starting point for a fine was \$3,000, having regard to "Mr EL's lack of engagement with the complaints process and prior disciplinary history." However, after taking into account Mr EL's "current circumstances including his age, recent retirement and health issues" the Committee settled on a fine of \$2,000.

[237] A fine of \$3,000, being 20 per-cent of the available maximum, could justifiably be described as modest. Anything less than that, is a small fine.

[238] The deficiencies identified by the Committee with Mr EL's conduct, were not trivial. They included a lack of competence in the management of the estate files (or some of them), and what must be seen as significant overcharging. Ordering a lawyer to reduce a fee by an order of 40 per-cent is reflective of that.

[239] Although I have reduced the percentage amount by which Mr EL must reduce certain of his fees to the Estate of Mr OM, I have nevertheless upheld the finding (albeit on a different basis) that Mr EL did not appropriately manage the physical files associated with this estate administration, together with the finding that he charged fees that were excessive.

²⁶ Standards Committee determination at [44]–[45].

[240] I would have said that a starting point for a fine in a matter such as this, would be closer to \$4,000.

[241] In my view the Committee gave proper and compassionate allowance for Mr EL's difficult professional and personal circumstances, as at the middle of 2019. A fine of \$2,000 reflects that care and compassion and I do not intend to interfere with it.

[242] Similarly, the award of costs imposed (\$500) could only be seen as very generous, given the delays which bedevilled the Committee's inquiry, almost all of which were due to Mr EL's lack of engagement.

[243] It is appropriate that the Committee's costs award, remains.

Decision

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

- (a) Modified as to the finding that Mr EL breached r 3 of the Rules and replaced with the finding that his conduct in the management of the physical estate files would be regarded by lawyers of good standing as being unacceptable, pursuant to s 12(b) of the Act.
- (b) Confirmed as to the finding that Mr EL charged fees that were excessive and that this was a breach of r 9 of the Rules.
- (c) Modified as to the order that Mr EL must reduce by 40 per-cent the total fees charged by him, and replaced with orders that he must reduce or cancel the fees charged to the Estate of Mr OM as follows:
 - (i) In relation to File 41, Mr EL's GST and disbursement inclusive fees are reduced from \$3,025 to the GST and disbursement inclusive sum of \$1,293.75 (a difference of \$1,731.25).
 - (ii) In relation to File 56, Mr EL's GST and disbursement inclusive fees of \$1,457.50 are cancelled.
 - (iii) In relation to File 45:
 - Fees for that part of the omnibus invoice on File 45 relating to "General Administration" (\$2,500 plus GST), are cancelled.

- Fees for that part of the omnibus invoice on File 45 relating to “[ABC]” (\$1,250 plus GST), are cancelled.
- (iv) Fees charged on Files 35 and 39 (\$75,900) are to be reduced by 30 per-cent (\$22,770.00) giving a GST and disbursement inclusive fee of \$53,130.
- (d) Confirmed as to the finding of unsatisfactory conduct, but modified to record this as being made under s 12(b) and (c) of the Act.
- (e) Confirmed as to the imposition of a fine and the payment of costs to the New Zealand Law Society.

[245] It would appear to be the case that as he issued invoices during this retainer, Mr EL deducted his fees from funds held on behalf of Mr OM’s estate. Of itself, that does not appear to raise any disciplinary issues.

[246] However, it does raise the issue of whether I ought to order Mr EL to refund the fees I have found to be excessive, to Mr OM’s estate.

[247] I cannot think of a reason why I should not do so.

[248] By my calculations, Mr EL has been ordered to reduce or cancel fees totalling \$30,271.25 (GST and disbursements inclusive).

[249] Pursuant to s 156(1)(g) of the Act, I order Mr EL to refund the sum of \$30,271.25 to the Estate of Mr OM. That refund must be paid by Mr EL to the New Zealand Law Society, for distribution by it, by no later than 4pm on Friday, 14 May 2021.

Costs on review

[250] When a Committee’s adverse finding is upheld by a Review Officer, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. It follows that Mr EL is ordered to pay costs in the sum of \$1,200 to the New Zealand Law Society by 5pm on Friday 14 May 2021, pursuant to s 210(1) of the Act.

Enforcement of money orders

[251] Pursuant to s 215 of the Act, I confirm that the money orders made by me in [249] and [251] above, may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[252] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 31st day of March 2021

R Hesketh
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 EL as the Applicant
Mr SV as a Respondent
Ms DV as a Respondent
Mr JV as a Respondent
[Area] Standards Committee [X]
New Zealand Law Society

Schedule of files

Matter no	Matter	No of files	Date opened	Assessor's comments
35	Probate and Administration	4	14/3/13	\$69,485 GST excl Excessive. Lack of clear time recording. No basis for July, Sept and Oct 2014 fees
36	Sale of [123]Property	2	File 1: April 2013 [from file note] File 2: 23/7/14	\$5,510. OK
38	Deed of Family Arrangement	1	Not noted	\$977.50 OK
39	[ABC] Road	1	Not noted	\$6,415 - excessive
40	[ABC]House Fund. No invoice on file. See note 2 below.	1	July 2013 file note	Not assessed.
41	Summary judgment	1	Sept 2013 draft letter	\$3,025. No invoice and no time recording. No comment made
42	[W]'s Claim. No invoice or time records on the file. See note 2 below.	1	2/10/13	Not assessed
43	Claim by Q OM. Appears to be the same matter as file 45. No invoice on file. See note 2 below.	1	30/10/13	Not assessed.
44	PE: PRA Claim. See note 2 below.	1	17/1/14	\$850. OK
45	Q's FP claim. Appears to be the same matter as file 43. See note 2 below.	1	23/5/14	Not assessed.
46	[HH] Services. No invoice on file.	1	4/7/14	Not assessed.
47	Claimant's litigation	3	30/7/14	\$750 x 2 invoices. OK
48	Sale of [DEF]	1	18/3/15	\$2,100. OK
49	Tenancy [DEF]	1	29/4/15	No invoice on file. No comment made.
50	Relationship Property: PE No invoice or time records	1	1/5/15	Not assessed.
51	Release of Land Covenant. No invoice or time records	1	24/7/15	Not assessed.
52	Sale to [456]	1	7/8/15	\$1,650 - OK
56	Distribution. Invoice for \$1,250 + GST (\$190.11) + search fee (\$17.39) = \$1,457.50	1	10/5/17	Not assessed.
	[OM]Estate – appears to be duplication of file 41. No invoice or time records. Counsel's invoice attached: \$6,500 + GST = \$7,475		6/9/13	Not assessed.
	Family Protection Relationship Property – appears to be a duplication of file 50. No invoice or time records.		Correspondence Aug 2014	Not assessed.
	Assorted loose papers			

Notes:

- 1 Cost Assessor does not refer to the following files provided to the LCRO by Mr EL:
 - (a) File 40: [DEF] House fund (no invoice on file).
 - (b) File 42: W's claim (no invoice on file).
 - (c) Files 43 & 45: Q's FP claim (no invoice on File 43; invoice for other matters on File 45).
 - (d) File 46: [HH]Services (no invoice on file).
 - (e) File 50: Relationship Property: PE (no invoice on file).
 - (f) File 51: Release of Land Covenant (no invoice on file).
 - (g) File 56: Distribution (invoice for \$1,457.50 [GST and disbursements inclusive]).
 - (h) Two unnumbered files. One, "OM Estate", includes counsel's invoice for attendances in relation to File 41 (the proceedings to remove Q OM from one of the estate properties).

 - 2 File 45 includes an invoice for: "General Administration" (\$2,500) and "[DEF]" (\$950) and "[ABC]" (\$1,250) and "PE and W's and Q's claims" (\$1,950) = \$6,650 + GST (\$997.50) = \$7,647.50.

 - 3 Fees upheld by assessor:
 - (a) File 36: \$5,510
 - (b) File 38: \$977.50
 - (c) File 44: \$850
 - (d) File 47: \$750 and \$750
 - (e) File 48: \$2,100
 - (f) File 52 \$1,650TOTAL: \$12,587.50

 - 4 Fees reduced by assessor:
 - (a) File 35: \$69,485
 - (b) File 39 \$6,415TOTAL: \$75,900

 - 5 Fees not assessed:
 - (a) File 41: \$3,025
 - (b) File 45: \$2,500 + \$950 + \$6,650 = \$10,100
 - (b) File 56: \$1,250TOTAL: \$14,375
- TOTALS: \$102,862.50 (assessor says \$105,318.75 GST inclusive)