

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

EZ

Applicant

AND

UO

Respondent

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

DECISION

Introduction

[1] Mrs EZ has applied for a review of a decision by the [Area] Standards Committee X (the Committee) to take no further action in respect of her complaints concerning the conduct of the respondent, Mr UO.

Background

[2] Mrs EZ and her late husband Mr EZ, owned a company, [Company A]. Building materials were supplied to the EZ's company by [Company B].

[3] By September 2004, the EZ's company was indebted to [Company B] in a sum of around \$376,000. To stave off the threat of liquidation, Mr EZ agreed to transfer [an item] he owned ([Item A]) to [Company B] in settlement of the outstanding debt. As a condition of the deal, Mr OM, the director of [Company B], agreed that Mr EZ could continue to have the use of the [Item A].

[4] In May 2012, Mr OM learnt that the ownership of the [Item A] had been transferred to Mrs EZ. [Company B] placed a caveat on the [Item A], and issued proceedings in the High Court.

[5] Mr and Mrs EZ instructed Mr UO to have the caveat removed and to defend the proceedings.

[6] Mr UO was instructed in January 2014. His retainer was terminated in early March, 2015.

The complaint and the Standards Committee decision

[7] Mrs EZ lodged her complaint with the New Zealand Law Society Complaints Service (NZLS) on 30 May 2016.

[8] Mrs EZ's complaint was accompanied by a lengthy submission.

[9] That submission sets out not only Mrs EZ's complaints against Mr UO, but provides her views about the justice system in general. It is Mrs EZ's view that the justice system does not serve the public well. She complains that the litigation in which she and her late husband were engaged had extracted a considerable financial and emotional toll on them both. She suggests that the litigation was deliberately prolonged by the lawyers involved, in order to serve their own interests.

[10] She complains that the Judge engaged in the proceedings was complicit in this process, and is frustrated that complaints she has made both against the presiding Judge and counsel acting for the plaintiff in the proceedings have not been upheld.

[11] To a degree, Mrs EZ's complaint endeavours to relitigate the case that was before the Court. She contends that the plaintiff's case was misguided from commencement.

[12] From this broad canvas, it is necessary to identify the specific conduct complaints that are made against Mr UO.

[13] I have carefully read the complaint filed by Mrs EZ, and I agree with the Committee that the substance of her complaints against Mr UO can be summarised as complaint that Mr UO:¹

- (a) conducted the litigation incompetently;

¹ Standards Committee determination, 16 May 2017 at [5].

- (b) failed to treat Mrs EZ with respect and courtesy;
- (c) ignored a Judge's direction to provide her file to another lawyer;
- (d) failed to disclose all relevant documents;
- (e) charged fees that were excessive; and
- (f) failed to release her files to her new lawyers in a timely fashion, despite having been directed by a judge to do so.

[14] Mr UO provided a response to the complaint on 29 December 2016.

[15] He submitted that:

- (a) Mrs EZ failed to understand the legal process in which she was engaged, and frequently refused to engage in the process;
- (b) Mrs EZ failed to understand or comply with the discovery process;
- (c) his brief was terminated before discovery was completed and before briefs of evidence were exchanged;
- (d) there was no evidence to support allegation that he had failed to manage the file in a competent manner;
- (e) he had treated Mrs EZ with courtesy and respect at all times, despite on occasions having to deal with extremely provocative behaviour from Mrs EZ;
- (f) Mrs EZ instructed fresh counsel after he had rendered his account, and after Mr UO had advised her that he could not continue to represent her if his fees were not paid;
- (g) allegation that he had ignored a judge's direction to refer Mrs EZ to another lawyer is incorrect. He is unaware of any such direction. The last direction that he received from the Court, was a minute of an Associate Judge dated 16 February 2016, that minute being delivered after he had attended a directions hearing. There is no indication in that minute of the judge directing that the file be transferred;
- (h) he was an experienced civil litigator;

- (i) the crux of Mrs EZ's complaints related to the issue of discovery. His ability to comply with directions for discovery had been frustrated by Mrs EZ's failure to provide documents requested;
- (j) Mrs EZ refused to engage in the discovery process;
- (k) he had provided copies of all documents requested to Mrs EZ's new counsel but had found it difficult to ascertain which documents counsel was seeking;
- (l) he had made request of Mrs EZ's new counsel to clarify whether counsel required a copy of the file.
- (m) Whilst there may have been some delay and confusion in providing additional documentation to Mrs EZ's lawyer, the delay was occasioned because of:
 - (i) uncertainty as to which documentation was required;
 - (ii) difficulties in contacting Mrs EZ's counsel; and
 - (iii) difficulties with an email server.
- (n) the initial estimate given to Mrs EZ was to cover costs involved in removal of the caveat;
- (o) a further estimate was provided, when it was clear that the dispute was becoming more complex, and that proceedings would need to be defended;
- (p) Mrs EZ had been charged at a moderate hourly rate;
- (q) accounts were based largely on a time and attendance basis; and
- (r) Mrs EZ had failed to follow his advice on significant matters.

[16] The Standards Committee delivered its decision on 16 May 2017.

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

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

- (a) It could find no evidence that Mr UO had failed to provide competent representation. To the contrary, Mr UO appeared to have used his best endeavours to assist Mrs EZ.²
- (b) It found no evidence of Mr UO failing to treat Mrs EZ with courtesy and respect.³
- (c) It could find no evidence to suggest that the Court had directed that Mrs EZ be referred to another lawyer.⁴
- (d) It accepted Mr UO's explanation that he had difficulty obtaining relevant documents from Mrs EZ.⁵
- (e) It was satisfied that Mr UO had, to the best of his ability, complied with his duty to ensure that Mrs EZ complied with her discovery obligations.⁶
- (f) Fees charged were fair and reasonable.⁷
- (g) It could find no evidence to suggest that Mr UO had failed to release Mrs EZ's files in a timely manner.⁸

Application for review

[19] Mrs EZ filed an application to review the Committee's decision on 3 July 2017.

[20] Her application raises some matters which were not put before the Committee.

[21] I am not able, on review, to address fresh complaints.

[22] Subsequent to filing her review application which was supported by detailed submissions, Mrs EZ filed further submissions. I have considered all the submissions filed.

[23] In essentially restating the nature of her complaints, Mrs EZ submits that:

- (a) Mr UO had "triple" charged for endeavouring to obtaining documents that had been provided to him;

² At [9].

³ At [16].

⁴ At [20].

⁵ At [27].

⁶ At [27].

⁷ At [41].

⁸ At [49].

- (b) Mr UO continued to make request of her former lawyers to provide documents, when those lawyers had made it clear that they did not hold any additional documentation;
- (c) Mr UO had acquiesced to unnecessary demands to provide further documentation;
- (d) Mr UO had failed to provide the Court with documents material to the case that were in his possession;
- (e) Mr UO had failed to provide his file in accordance with a direction made by a Judge;
- (f) costs charged were excessive;
- (g) Mr UO had failed to invoice regularly; and
- (h) her complaints were levelled not only at Mr UO, but also the lawyer for the plaintiff and the Associate Judge who had managed the case.

Review hearing

[24] The review was heard on 1 November 2017. Both parties participated in the hearing. Mrs EZ had advised that she was unable to attend a hearing in person. To accommodate her, the hearing was conducted by phone.

Nature and scope of review

[25] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁹

... 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,

⁹ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

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.

[26] More recently, the High Court has described a review by this Office in the following way:¹⁰

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.

[27] 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.

Analysis

Issue 1 — Did Mr UO fail to provide competent representation?

[28] Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) provides that a lawyer must, when providing regulated services to a client, always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[29] Mrs EZ's accusations that Mr UO failed to provide her with competent representation are couched within her more expansive criticisms of the justice system.

[30] She is critical of the fact that she was required to respond to a claim that she considers was fabricated and lacking in merit.

[31] She is concerned that so much of her time and resources had to be spent on defending what she perceived to be an entirely spurious claim.

[32] In her submissions, she frequently returns to suggestion that the lawyers engaged in the proceedings (including Mr UO) failed to identify that the claim against her lacked merit, and that they were complicit in allowing the proceedings to continue in

¹⁰ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

order to promote their own interests. In her complaint to the Law Society, dated 30 May 2016, she describes the legal system as having been “set up for the advantage of the plaintiff and defenders’ lawyers, who consider their clients are just pawns in a game between two lawyers at great expense to those pawns”.

[33] Mrs EZ’s case did not proceed to hearing. It was settled three days before the hearing was to commence.

[34] Mrs EZ argues that the case should have been settled two years earlier than it was.

[35] Suggestion that Mr UO failed to act in a competent fashion begins with the allegation that he could have brought the matter to an end more expeditiously.

[36] I am uncertain as to precisely how Mr UO could have been expected to bring the proceedings to a more expeditious resolution.

[37] Mrs EZ was the defendant in the proceedings. If it was the case, as it appears to be, that the plaintiff in the proceedings was resolute and determined to advance his case, there was little that Mr UO could do other than ensure that his client’s defence was properly advanced.

[38] There is no evidence advanced to support the conclusion that application could or should have been made to have the plaintiff’s claim struck out, and I note that no such application was made by the lawyer who took over the case from Mr UO.

[39] Mrs EZ explains why she considered the plaintiff’s case was materially flawed. In doing so, she discusses the evidential issues that were in conflict, and argues that the plaintiff’s case was weak at the outset.

[40] That may or may not have been the case. It is not the role of the Review Office to cast itself in the role of a de-facto court and proffer conclusions as to the merits or otherwise of a party’s claim that has been litigated before the Court.

[41] Mr UO’s advice was clearly to oppose the plaintiff’s claim. The plaintiff eventually withdrew his claim. It is reasonable to conclude that Mr UO’s advice at the outset was sound, and based upon the instructions he had received from Mr and Mrs EZ.

[42] Inevitably, the path the litigation took was influenced to a degree by the approach adopted by the plaintiff. At issue was argument as to whether Mrs EZ’s husband had transferred the ownership of a yacht to settle an outstanding debt. There

was argument as to who owned the vessel. If the matter had proceeded to trial, it is probable that the Court would have been required to make both evidential and credibility findings.

[43] I accept that Mrs EZ was frustrated by the delay, and worn down by the process. Litigation frequently exacts a demanding toll on those involved. But I am not persuaded that Mr UO unduly delayed the process, nor that it was in his command to bring the matters to an end, in the face of a plaintiff who was committed to advancing the matter to trial.

[44] Nor does the fact that the matter was settled prior to hearing establish that Mr UO should have been able to bring the matter to an earlier conclusion. There can be a multitude of reasons why a party may elect to settle at the last minute. It is not uncommon for civil cases to be settled at the courtroom door.

[45] Mrs EZ suggests that the lawyer who took over from Mr UO was immediately able to give the case more focus and direction. She suggests that her new lawyer was critical of the strategy that Mr UO had adopted, and that he had recommended that Mrs EZ should refuse to pay any further fees to Mr UO.

[46] There are other instances where Mrs EZ suggests that her lawyer was critical of Mr UO (for example the approach taken with discovery) but she provides no evidence from her lawyer to support these accusations. There is for example, no correspondence exhibited from her lawyer which specifically addresses and records the criticisms that are ostensibly made of Mr UO.

[47] Mrs EZ pointed me to a document on the file which she noted was in Mr LG's handwriting. She contended that the document was a summary of the shortfalls that Mr LG had identified in Mr UO's conducting of her case.

[48] I was not satisfied that the document was an accurate and unvarnished account of Mr LG's views, and to the extent that the document recorded Mrs EZ's personal views, it could not be said that the document was solely an accurate and fair reflection of Mr LG's views. I could not be satisfied that the document wasn't simply a record that Mr LG had made of the concerns that Mrs EZ had expressed to him.

[49] Mr UO's retainer was terminated before discovery was completed. He had provided initial advice in respect to the caveat that had been registered and general matters. Proceedings then having been commenced, he had drafted a statement of defence, attended to initial discovery, appeared in Court and responded to various administrative matters as required by the Court.

[50] The matter was settled in March 2016, some thirteen months after Mr UO's retainer was terminated.

[51] It clearly was not the case that Mrs EZ's new lawyer was able to bring the matter to immediate resolution shortly after picking up the case.

[52] An integral aspect of Mrs EZ's criticism that Mr UO failed to provide competent representation is her concern that Mr UO failed to manage the discovery process. That issue is raised as a separate complaint, and will be dealt with later in this decision.

[53] Having carefully considered the submissions, I am not persuaded that Mr UO failed to provide Mrs EZ with competent representation.

Issue 2 — Did Mr UO fail to treat Mrs EZ with courtesy and respect?

[54] Rule 3.1 of the Rules provides that a lawyer must at all times, treat their client with courtesy and respect.

[55] This allegation appears to be based on accusation that Mr UO had, on occasions, spoken to Mrs EZ in such forceful terms that his behaviour approached the disrespectful.

[56] Mr UO accepts that he had on occasions made it clear to Mrs EZ that he considered that she was misguided in her view of certain aspects of the case. He suggests that Mrs EZ had difficulty understanding some of the legal concepts that were engaged by the case. He rejects however any suggestion that he had ever behaved discourteously to Mrs EZ. He maintains that on occasions Mrs EZ was extremely volatile in her dealings with him, and that he was required at times to manage that volatility.

[57] I take it from the manner in which Mr UO describes these exchanges that he considered that he had been required at times to be forthright with Mrs EZ. There is no harm in that. Whilst a lawyer is required to follow their client's instructions, that imperative does not absolve them of the important responsibility to advise their client if they consider that their client is misguided. Firm direction can be particularly critical in litigation cases where missteps can be costly for the client.

[58] There is a distinction, however, to be drawn between the forthright and the discourteous, and a lawyer should never, in their dealings with their client, cross the line.

[59] In order for a conduct complaint to be upheld, it is fundamental that sufficient evidence is advanced to establish the complaint. In this case, there is no evidence that Mr UO behaved discourteously to Mrs EZ, other than bare allegation that he had done so. That allegation is rejected by Mr UO and countered by argument that he suffered a degree of discourteous behaviour from Mrs EZ.

[60] It is not established that Mr UO failed to treat Mrs EZ with courtesy and respect.

Issue 3 — Ignored a Judges direction to provide her file to another lawyer/Failed to release her files to her new lawyers in a timely fashion, despite having been directed by a Judge to do so

[61] These two complaints are inter-related.

[62] Mrs EZ submits that after she had terminated Mr UO's retainer, the Court directed that Mr UO was to provide the documentation that he had retained from her file to her new lawyer.

[63] She contends that Mr UO failed to comply with the Court's direction, and with requests from her new lawyer to provide her with documentation requested. As a consequence she was unable to comply with directions for discovery issued by the Court. This failure resulted, she says, in the Court directing her to pay costs to the plaintiff in the sum of \$6,868.

[64] Mr UO rejects suggestion that he failed to comply with Court directions. He acknowledges that there was a degree of delay in providing documents to Mrs EZ's new lawyer, but puts this delay down to:

- (a) difficulties in contacting her lawyer; and
- (b) confusion as to which documents were required.

[65] Mr UO does not accept that he was responsible for Mrs EZ incurring significant costs for non-compliance with discovery orders. He says that he had provided Mrs EZ with all relevant documentation, a position he suggests was supported by Mrs EZ's lawyer, and surmises that it was likely that Mrs EZ's lawyer had similar difficulties to his own in encouraging Mrs EZ to assist in facilitating full discovery.

[66] In considering whether Mr UO failed to comply with directions from the Court, it is necessary to examine the directions made by the Court, and the exchanges between Mr UO and Mrs EZ's counsel, Mr LG.

[67] Regrettably, detailing this background has inevitably resulted in this decision being longer than I would have wished. However, for reasons which will become apparent, argument as to whether Mr UO failed to comply with court directions and requests from Mrs EZ's counsel can only be assessed against the backdrop of the various directions made by the Court, and the requests made by Mrs EZ's lawyer.

(a) *The Court Directions*

[68] The Plaintiff in the proceedings filed an application for particular discovery.

[69] In a memorandum provided to the Court on 30 January 2015, Mr UO advised that:

- (a) the discoverable documents were held by a number of third parties, including [Law Firm A], barristers and solicitors, and various companies;
- (b) the companies had been slow to respond to request to provide documents;
- (c) [Law Firm A] held a significant number of Mr and Mrs EZ's files of Mr and Mrs EZ's, and did not wish to provide all those files; and
- (d) Mrs EZ had been ill, and as a consequence it had been difficult for her to locate and provide all documentation requested.

[70] There is minor disagreement as to precisely when Mr UO's retainer was terminated, but it is apparent that the retainer had come to an end by early March 2015.

[71] In a minute of 16 February 2015, the Court recorded that the plaintiff may seek to have the defendant's notice of defence struck out, if there was non-compliance with directions made for discovery.¹¹

[72] In a minute of 2 April 2015, the Court, in an attempt to expedite the discovery process, directed that:¹²

A copy of this minute is to be sent by counsel for the second defendant to [Law Firm A] and [Law Firm B]. I expect them to make the relevant file(s) available so that the second defendant can complete discovery. I reserve leave to them to file and serve memoranda not later than 30 April 2015 if they consider they have proper reasons to resist doing so. I will assume that the second defendant will meet the reasonable costs of providing copies of documents requested.

¹¹ [Company B] v EZ HC Auckland [citation removed], 16 February 2015.

¹² [Company B] v EZ HC Auckland [citation removed], 2 April 2015 at [8].

[73] I am uncertain as to whether Mr UO received a copy of that minute. His recollection was that he had not.

[74] The matter was back before the Court on 15 May 2015. Mr LG had advised the Court that there had been ongoing difficulties with discovery because of Mrs EZ's apparent inability to obtain access to the files held on her behalf by [Law Firm B]. Whilst Mr LG indicated to the Court that he considered it was unlikely that Mr UO had documents in his possession that had not been disclosed when Mr UO was acting, counsel for the plaintiff was insisting that full discovery had yet to be completed.

[75] In a minute issued on 18 May 2015, the Associate Judge recorded her expectation that further discovery would proceed without impediment in the following terms:¹³

I would expect Mr UO to advise Mr LG of two things:

- (a) First that he will give Ms EZ a reasonable opportunity to inspect her files and to take copies of the documents she requires, unless of course he is able to confirm to Mr LG that he has already provided to Mr LG copies of all of the documents on those files.
- (b) Of the **reasonable** costs of providing photocopies of any documents that Ms EZ requires. (I would expect this task to be one that could be undertaken by an administrative staff member of [Law Firm B], and not by Mr UO himself).

[76] The Court forwarded a copy of the 18 May 2015 minute directly to Mr UO on the day the minute was delivered.

[77] The matter was back before the Court on 12 June 2015 to review progress. The Court was not satisfied that discovery had been completed in accordance with its earlier directions, and seemingly frustrated by the fact that Mr LG had been unable to obtain documents from Mr UO. In a minute delivered on that day, the Court noted that:¹⁴

The further affidavit does not deal with the requirement to make discovery of the second defendant's file held by [Law Firm B]. Mr LG advises that there have been further endeavours to obtain the file, but that Mr UO has taken the view that he is not required to provide copies of the file because of the particular wording I used in para 8 of my minute of 18 May 2015, where I indicated that this was a task that could be undertaken by an administrative staff member of [Law Firm B] and not by Mr UO himself. I am not impressed by this response, for reasons that do not need expansion. I expect Mr UO to now immediately provide copies of the documents on the file to Mr LG by not later than 19 June 2015. I have Mr LG's undertaking that he will meet the reasonable costs. As I have already indicated in previous minutes, the second defendant has an

¹³ [Company B] v EZ HC Auckland [citation removed], 18 May 2015 at [8] (emphasis in original).

¹⁴ [Company B] v EZ HC Auckland [citation removed], 12 June 2015 at [2].

entitlement to copies under the Privacy Act. If there are ongoing delays on Mr UO's part, he can expect the matter to be referred to the Law Society.

[78] The court then turned its attention to costs. Costs of \$6,868 were awarded in favour of the plaintiff, with the proviso that payment of the costs was suspended, pending completion of discovery. The Court directed that if the documents on Mr UO's file had already been discovered, then the Court would consider a request from the second defendant to adjust the quantum of the costs order.

[79] Mr UO is adamant that the Court did not forward him a copy of the 12 June 2015 minute.

[80] To summarise the Court directions:

- (a) On 2 April 2015, it had directed that Mr UO and [Law Firm A] provide their files.¹⁵
- (b) On 18 May 2015, it had directed that Mrs EZ be provided opportunity to inspect her files.¹⁶
- (c) On 12 June 2015, it had directed that Mr UO provide copies of documents on the file.¹⁷

(b) *Exchanges between the lawyers*

[81] Attention then turns to the exchange of correspondence between Mr UO and Mr LG following the directions from the Court.

[82] On June 11 2015, Mr LG spoke with Mr UO's legal assistant.

[83] Following that conversation, Mr LG forwarded a copy of the 18 May 2015 minute to Mr UO's office, and made request of Mr UO's legal assistant for Mr UO to confirm that a copy of Mrs EZ's file would be ready for collection the following day.

[84] Mr UO's legal assistant immediately responded to Mr LG, advising as follows:

Mr UO is more than happy for Ms EZ to make a time inspect [sic] her files in accordance with paragraph[8](a) of her Honours minute and to provide her with copies of the documents she requires. Ms EZ has not telephoned our office for some weeks now to the best of my knowledge. Mr UO does not believe that he is required to provide a copy of the file as you state below in your email. The reason Mr UO states that Ms EZ needs to contact our office is as noted in

¹⁵ [Company B] v EZ above n 12.

¹⁶ [Company B] v EZ above n 13.

¹⁷ [Company B] v EZ above n 14.

paragraph [8] (b) of her Honours Minute this exercise is to be undertaken by an administrative staff member of my office and not Mr UO.

[85] Further, Mr UO's assistant confirms that Mr UO did not believe that Mrs EZ had visited his office to deliver a copy of the 2 April 2015 minute, as it had been represented to the Court she had. His recollection is consistent with Mrs EZ's own evidence. She was emphatic that she had not visited Mr UO's office after termination of the retainer in March 2015.

[86] On 23 June 2015, Mr LG made urgent request of Mr UO's office to provide Mrs EZ's file. He advised that he required the file so that he could meet his obligations to the Court to file an amended discovery affidavit. Mr UO's legal assistant advised Mr LG that as far as she was aware, Mr UO had not been directed to provide the file.

[87] She was correct. At this point, the direction made by the Court required Mr UO to provide Mr LG with "copies of the documents on the file".¹⁸

[88] On 25 June 2015, Mr LG advised Mr UO that the judge had directed that Mr UO was to provide him with a copy of the file. That was an inaccurate description of the judge's direction. Mr UO had been asked to provide Mr LG with copies of documents from the Court file.

[89] Mr UO responded confirming that he had not, as he had previously advised, seen a copy of the judge's minute of 12 June 2015. He acknowledged that if the Court had made a direction that he was to provide a copy of Mrs EZ's file, he would be obliged to follow that direction. He sought clarification as to which documents Mr LG required.

[90] He made request of Mr LG to forward any responses to his receptionist's email address, as he was at that time experiencing difficulties with his personal email.

[91] Suggestion that Mr UO was having trouble with his email was pertinently raised around the time that the High Court was endeavouring to forward him a copy of the June minute, and this, combined with Mr UO's immediate response to Mr LG's reference to the minute, persuades me that Mr UO had not received a copy of the 12 June 2015 minute.

[92] On 8 July 2015, Mr LG asked Mr UO to confirm if a copy of Mrs EZ's file was available for collection.

¹⁸ [Company B] Hardware and Timber Ltd v EZ above n 13 at [8].

[93] On 9 July 2015, Mr UO sought clarification from Mr LG over whether he required the entire file, or just the documents. Mr UO advised that to the best of his recollection, all the documents listed in the affidavit of documents filed with the Court, had been scanned and forwarded to the plaintiffs' lawyer.

[94] This was met with response from Mr LG the following day, in which he advised Mr UO that he required the whole file, in order to meet his obligations to the Court.

[95] There were further exchanges between Mr UO and Mr LG which traversed familiar ground, but on 10 July 2015, Mr LG wrote to Mr UO in the following terms:

I need a copy of the whole file please to meet my obligations to the court. If you have some of the documents on email I would be happy to receive those by email and the remainder of the documents could be copied.

[96] On 14 July 2015, Mr LG made further request of Mr UO to provide him with a copy of the file.

[97] A number of documents were forwarded to Mr LG's office on that date.

[98] Mr LG then advised Mr UO that the documents received appeared to be copies of documents that were originally discovered by Mrs EZ. Mr LG emphasised to Mr UO that his obligation was to provide a copy of his whole file, so that Mrs EZ could discover any additional documents on the file that had not disclosed as part of the original affidavit of documents.

[99] The proceedings were due to be called in a chambers list. The plaintiff's counsel was becoming frustrated as the supplementary affidavit required to be filed by Mrs EZ, had not been filed.

[100] On 15 July 2015, counsel for the plaintiff, Mr SB, emailed Mr UO's office and complained that the additional documents he had been provided with appeared to be copies of documents that were originally discovered by Mrs EZ. He noted that "Mr UO should be providing a copy of his whole file to Mr LG so that Mrs EZ can discover any additional documents on the file that were not disclosed as part of the original affidavit of documents". Mr SB also emailed Mr LG expressing his concern.

[101] It clearly was the plaintiff's position that it continued to believe that Mrs EZ had failed to discover relevant documents, and that those documents continued to reside with Mr UO. Mr LG was put on notice that the plaintiff reserved its rights to seek costs against Mr LG's client, on the basis that his client had failed to comply with directions for discovery.

[102] On 30 July 2015, Mr LG advised Mr SB that he had still not received documents from Mr UO. He noted that he had had some difficulty making contact with Mrs EZ. Mr LG emailed Mr UO advising that he was still unable to notify the Court as to what documents Mr UO had in his possession that had not been discovered. He made further request for a copy of Mrs EZ's file to be sent immediately to his offices.

[103] Mr UO responded, by email dated 30 July 2015, advising that he was "still not quite sure what you are wanting". Despite this apparent uncertainty, Mr UO noted in that email that, "however, from the above it is somewhat clearer. I will very shortly have my office scan the documents I have in my possession that have not been disclosed (because I believe they are irrelevant)."

[104] On 31 July 2015, Mr UO forwarded to Mr LG's office documents which he understood to be the "few documents not disclosed – because, as advised, I believe they are irrelevant".

[105] That appears to have ended the prolonged discussion over discovery obligations, and it is against that backdrop that complaint that Mr UO failed to comply with directions from the Court and failed to provide documents to Mr LG must be considered.

[106] Having carefully considered both the minutes issued by the Court, and the discovery requests made by Mr LG, I am satisfied that there was a degree of disconnect between the lawyers in their understanding as to what had been requested by the Court. This is not to be critical of either counsel, the misunderstandings that may have arisen were in my view genuine and explainable.

[107] It was understandable that Mr UO continued to respond to request from Mr LG to provide a copy of the file, with request for clarification as to which documents were required.

[108] Nor was it the case that problems with finalising discovery only arose after the termination of Mr UO's retainer, or that the difficulties were solely focused on obtaining information which remained on the files he was holding.

[109] In December 2014, Mr UO had advised counsel for the plaintiff that he was having difficulty obtaining Mrs EZ's files from her former lawyers. He suggested to Mrs EZ that it may speed matters up if she was to make arrangements herself to uplift the files.

[110] In February 2014, Mr UO advised Mrs EZ that he had been unable to secure the information sought from her former lawyers, and that he was still awaiting response from her in respect to the request he had made for her to provide further information. Mr UO advised Mrs EZ that it would be beneficial if she could provide the information required before the next court date. He indicated that he was anxious to complete the discovery process.

[111] The Court then had been awaiting further discovery not only of documents from Mrs EZ, but also documents held by her former lawyers.

[112] Mrs EZ did not accept that [Law Firm A] had a responsibility to provide her with documentation. She said that [Law Firm A] had advised her that they could offer her no assistance, and that any problems with discovery were the responsibility of Mr UO.

[113] I make no comment on that except to note that it presumably was the plaintiff's position that [Law Firm A] were in possession of documents that had relevance for the case, and clearly the Court had directed that they were to make their files available.

[114] But what is clear, is that responsibility for the difficulties and delay in finalising discovery at this point, could not fairly be sheeted home to Mr UO.

[115] There were clearly difficulties in obtaining documents from third parties, and the correspondence on the file gives fair indication that Mrs EZ, for a variety of reasons, was not responding to requests to provide documents as promptly as Mr UO would have liked.

[116] As noted the specific directions made by the Court following the 15 May 2015 hearing, were that:

- (a) Mrs EZ was to be given reasonable opportunity to inspect her files and to take copies of any documents she required; and
- (b) the reasonable cost of photocopying would be met by Mrs EZ.

[117] As part of that direction, the Judge indicated that the task of photocopying documents could be undertaken by a member of Mr UO's staff.

[118] At this point, Mr UO was not being directed to provide a copy of his file, he was being asked to ensure that Mrs EZ had opportunity to attend at his office to inspect the documents held, and to copy any documents she considered relevant.

[119] At the hearing on 12 June 2015 Mr LG had advised the Court that Mr UO had taken the view that he was not required to provide copies of the file, because of the Judge's direction in her 18 May 2015 minute that the task of copying the files could be undertaken by a member of Mr UO's staff. The Judge was critical of that approach.

[120] With every respect to the learned Judge, I consider the criticism made of Mr UO to be unreasonable. There is no indication that Mr UO was attempting to evade his obligations to disclose by shielding behind argument as to who from his office was required to facilitate the copying of the documents.

[121] It was understandable that the Judge would express her disapproval of such a specious argument if it had been the case that Mr UO was endeavouring to avoid his obligations, but Mr UO had not indicated a disinclination to comply with the Court's direction, but rather a preparedness to abide by it.

[122] Mr UO's receptionist could perhaps have articulated the position more clearly in her 11 June 2015 email to Mr LG, but it would be putting an oppressive construction on that correspondence to suggest that it was indicative of Mr UO's unwillingness to cooperate with the directions made by the Court.

[123] On 5 March 2015, Mr UO advised Mrs EZ that he would be unable to continue working on her file, if payment was not made to his outstanding account. Mr LG was instructed shortly thereafter.

[124] It could have been expected that the first step Mrs EZ's counsel would have taken on receiving instructions would be to arrange for Mrs EZ's file to be uplifted. Mr UO says that he received no request to uplift the file.

[125] Nor was it the case that Mr UO attempted to assert a lien over the file, as he would have been entitled to do. He says that he was never opposed to releasing the file. He had given no consideration to asserting a lien, and was happy to release the file if request was made.

[126] I accept Mr UO's evidence on that point. There is no evidence to suggest that he had, at any stage, raised objection to Mrs EZ retrieving her file.

[127] It may have been the case that Mrs EZ was uncertain as to her rights to secure the file in circumstances where her account was outstanding. With the benefit of hindsight, the difficulties in securing documents which may or may not have had relevance to the discovery process, could perhaps have been avoided at the outset by the simple expedient of Mrs EZ's counsel making a request to uplift his clients file. I

hasten to emphasise, that no criticism is intended of Mrs EZ's counsel. It would be speculative to postulate on what his instructions may or may not have been.

[128] But as of 18 May 2015, Mr UO's obligation was to provide opportunity for Mrs EZ to inspect her file, and from 12 June 2015, that obligation was to provide documents from the file.

[129] Despite any confusion there may have been as to the scope of the Court directions, as the matter progressed it became clear that Mr LG was seeking the complete file. When Mr LG made it unequivocally clear that he required a copy of the whole file to meet his obligations to the Court, it would, at that point, have been sensible and prudent for Mr UO to step back and reflect on the situation.

[130] If Mr LG's correspondence of 10 July 2015, or indeed any of his earlier missives, had been couched as request in terms of unequivocal instructions from his client and accompanied by the necessary authority to uplift the file, Mr UO would not have been taxed by difficulties over deciding which documents were or were not required. His task would have been a simple one of bundling and dispatching.

[131] From 10 July 2015 onwards there were continuing discussions over which documents were required. That inevitably resulted in further delay.

[132] Whilst it could be fairly argued that for a considerable degree of time there was a degree of confusion and apparent tension between the various directions made by the Court and the requests made by Mr LG, continued indication from Mr LG that he needed a copy of the whole file (this on the back of several requests for a copy of the file to be provided) should have alerted Mr UO to the fact that he needed to give serious attention to delivering the complete file to Mr LG.

[133] Mr LG was still requesting a copy of the file on 30 July 2015, and, Mr UO was continuing to make request of Mr LG as to whether he required the complete file.

[134] I accept however, Mr UO's submission that the correspondence on the file does not accurately reflect the full history of the exchanges between himself and Mr LG. He says for example, that early in the piece, Mr LG had advised him that he did not require a copy of the correspondence file.

[135] Opportunity for Mr UO and Mr LG to operate at cross purposes continued, with Mr LG advising Mr UO on 30 July 2015, that he required all the documents, but noted that the correspondence file was not relevant to the proceedings.

[136] Considering as I am required to do, the conduct complaints in their full context, I am not persuaded that the criticisms of Mr UO failure to comply with Court directions and with requests to provide his file, are sufficiently established to merit the consideration of imposition of a disciplinary sanction.

[137] I am satisfied that after Mr UO gave indication that he could no longer continue to act for Mrs EZ if she did not make payment to his outstanding account, Mrs EZ made no attempt to visit Mr UO's office to inspect and copy documents, despite the Court directing that she was able to do so.

[138] Once the Court had directed that Mrs EZ was to attend at Mr UO's office for purposes of inspecting and copying documents, Mrs EZ should have done precisely that. She had the assistance of legal counsel who would have been able to explain the process recommended by the judge in the 18 May 2015 minute.

[139] I consider that there was a degree of genuine misunderstanding in respect to the directions made by the Court, and that for a considerable period of time, requests were being made of Mr UO to provide his file, when the Court had not required him to do so. There was scope for genuine misunderstanding.

[140] An examination of the exchanges between counsel give indication that both were diverted on occasions by their commitments to various court hearings, and had difficulty at times making contact with each other. I do not, having carefully examined that correspondence, form a view that Mr UO was attempting to avoid sorting out the disclosure. He presented, as did Mr LG, as anxious to clarify what was required. The exchanges between Mr UO and Mr LG were courteous and professional.

[141] Nor am I persuaded that Mr UO can properly be held responsible for the costs award made by the Court.

[142] Problems with discovery were clearly attributable in part to Mrs EZ's failure to provide documents required to Mr UO, and the extent to which Mrs EZ cooperated with facilitating discovery with her new lawyer is uncertain.

[143] Nor is it clear whether the documents eventually provided by Mr UO had any significance for the discovery process, it being Mr UO's position that the documents had not been requested or required by the plaintiff.

[144] That explanation does not entirely assist Mr UO. The relevance or otherwise of the documents was a matter to be determined by the plaintiff, and ultimately the Court.

[145] But it is significant that following the costs order, no demand was made by Mrs EZ's counsel, for Mr UO to reimburse Mrs EZ for the costs incurred.

[146] If it was argued, as it now is, that Mr UO was solely responsible for the cost order, and if that was a view that was shared by Mrs EZ's lawyer, it could have been expected that demand would have been made on Mr UO.

[147] Mr UO confirmed that subsequent to his correspondence with Mr LG on 31 July 2015, he had had no further engagement with Mr LG or his office.

[148] There were a variety of reasons why discovery was not progressed more expeditiously.

[149] Whilst Mr UO properly concedes that communication between himself and Mr LG could have been better, and that there was some delay in providing the documents, I am not persuaded that the delay which can be fairly said to be attributable to Mr UO, was of sufficient gravity to merit consideration of the imposition of a disciplinary sanction.

Issue 4 — Fees

[150] Mrs EZ contends that Mr UO's fees were excessive.

[151] Her primary objection to the fees charged was a concern that Mr UO had spent unnecessary time on attending to discovery. It was her view that he had frequently replicated discovery tasks by making numerous requests for the same documents, and that this had significantly contributed to an unnecessary escalation in costs.

[152] Issues raised throughout this review frequently returned to matters relating to the discovery process.

[153] Mr UO maintained that he had difficulty completing discovery, because of Mrs EZ's failure to engage in the process. Put simply, it was his view that she was uncooperative.

[154] In my view, the Committee took a careful and considered approach to its consideration of the fees complaint.

[155] I agree with the Committee that it was appropriate for it to have concluded that there were special circumstances that merited it considering both the invoices

rendered, despite one of those invoices having been billed more than two years before Mrs EZ filed her complaint.

[156] Referring to the relevant authorities, this Office has observed that considerations to be taken into account when determining whether a fee is fair and reasonable include:¹⁹

- (a) Setting a fair and reasonable fee requires a global approach;
- (b) What is a reasonable fee may differ between lawyers, but the difference should be “narrow” in most cases;
- (c) While time spent must always be taken into account it is not the only factor;

[157] The High Court has held that it is:²⁰

... the obligation, which is clear from a number of authorities, for a practitioner who is using time and attendance records to construct a bill, to take a step back and look at the fee in the round having regard to the importance of the matter to the client, in some cases the client's means, the value to the client of the amount of work done, and proportionality between the fee and the interim or final result of the legal work being carried out.

[158] Because the process of determining a fair and reasonable fee is “an exercise in balanced judgment - not an arithmetical calculation”:²¹

... different people may reach different conclusions as to what sum is fair and reasonable, although all should fall within a bracket which, in the vast majority of cases, will be narrow.

[159] For that reason, this Office has referred to there being a “proper reluctance to “tinker” with bills by adjusting them by small amounts,” and that it “is therefore appropriate for Standards Committees not to be unduly timid when considering what a fair and reasonable fee is.”²²

[160] Also, that “where there is a complaint about a bill of costs there is no presumption or onus either way as to whether the fee was fair and reasonable.”²³

[161] It is only when a fair and reasonable fee has been determined “... can it be assessed whether the fee charged is sufficiently close to that amount to properly remain unchanged”.²⁴ A particular lawyer's approach to billing may not necessarily “...

¹⁹ *Hunstanton v Cambourne and Chester* LCRO 167/2009 (10 February 2010) at [22].

²⁰ *Chean v Kensington Swan* HC Auckland CIV-2006-404-1047, 7 June 2006 at [23].

²¹ *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 1 WLR 1504 (QB) at 1509.

²² Above n 19, at [62].

²³ At [63].

²⁴ At [64].

be a relevant consideration in determining whether a fee is fair and reasonable in all of the circumstances.”²⁵

[162] Rule 9.1 specifies “the factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include ...”. Thirteen factors are contained in paragraphs (a) to (m) of that rule. It is important to note that this list of factors is not exhaustive. Other factors may apply, on a case by case basis.

[163] I have given careful consideration to the invoices, the time records, and the evidence of the parties. That appraisal has been underpinned by a consideration of the r 9.1 factors.

[164] I am satisfied, as was the Committee, that Mr UO provided an initial estimate and revised that estimate when it became apparent to him that fees would exceed what was initially anticipated. I consider that Mr UO kept Mrs EZ properly informed.

[165] I also agree with the Committee that Mr UO’s hourly rate would likely fall at the lower end of the range for practitioners of similar experience to Mr UO. Mr UO indicated that he had, during the course of the retainer, raised his hourly rate but had not increased his rate for Mrs EZ.

[166] I cannot identify from the time records provided, evidence of Mr UO engaging in seemingly unnecessary or repetitive work.

[167] It would have been helpful if Mr UO had invoiced Mrs EZ more regularly. If he had done so, she would have been better informed about the escalating costs, and perhaps better able to manage those costs.

[168] But I am satisfied that the fees charged were fair and reasonable. In reaching that view, I pay particular regard to:

- (a) Mr UO’s level of experience (18 years as a civil litigator, a level 3 legal aid provider for civil matters);
- (b) the estimates provided;
- (c) time and labour expended;
- (d) fees customarily charged in the market and locality for similar legal services; and

²⁵ At [15].

(e) the time records.

[169] I accept that Mrs EZ considers that Mr UO had achieved little for her, but her assessment of the value of work that Mr UO had done for her appears to be driven in part by her view that the claim she was forced to defend lacked merit. She minimises, in my view, the significant amount of work that Mr UO did in laying the foundation for her defence.

[170] Whilst she argues that the lawyer instructed after Mr UO was able to bring the matter to prompt conclusion (this to suggest that Mr UO should have been able to achieve similar result) it is clear that the matter was settled some time after her new lawyer became involved.

[171] Mrs EZ was required to defend the claim that had been filed. Mr UO attended to a substantial amount of the work that was required to be done to lay a foundation for defending the claim.

[172] Mrs EZ was entitled to instruct fresh counsel, that decision seemingly made when she became concerned after receiving Mr UO's second account, but it would be speculative to postulate as to what outcome would have been achieved if Mr UO had continued to manage the file.

[173] Mrs EZ's challenge to the accounts rely largely on argument that Mr UO failed to efficiently attend to discovery.

[174] As is apparent, I am not persuaded that Mr UO mismanaged the discovery process, or that failings on his part contributed to a significant increase in costs.

[175] The Committee gave careful consideration to the fees complaint. Having looked at the fee issue afresh, as I am required to do, I find myself in agreement with the Committee that the fees charged were fair and reasonable.

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

Decision

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

DATED this 23rd day of November 2017

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:

Mrs EZ as the Applicant
Mr UO as the Respondent
Auckland Standards Committee 4
The New Zealand Law Society