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

[2024] NZLCRO 024

Ref: LCRO 149/2023

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| **CONCERNING** | an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006 |
| **AND** | |
| **CONCERNING** | a decision of the [Area] Standards Committee [X] |
| **BETWEEN** | **HV**<br>Applicant |
| **AND** | **BQ**<br>Respondent |

## DECISION

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

### Introduction

[1] The applicant has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) in which it found that he had engaged in unsatisfactory conduct in connection with his representation of the respondent in Court proceedings funded by a litigation funder, Claims Resolution Services Limited (CRSL).

### Background

[2] The respondent's home in Christchurch was damaged by the 2010 – 2011 earthquakes. She brought claims against the Earthquake Commission (EQC) and her insurer. By the time the applicant became involved, the insurance aspect was with Southern Response Earthquake Services Limited (Southern Response). Southern Response is a Government-owned entity established to assume responsibility for claims against AMI Insurance, which had become insolvent.

[3] I infer that there were significant difficulties with the claims.

[4] In May 2016, the respondent entered into a Litigation and Claims Management Agreement (LCM Agreement) with CRSL to support the investigation and conduct of her claims. The LCM Agreement is a 14-page formal contract with another 5 pages of schedules setting out the typical steps in both the "Claims Process" offered by CRSL and the "Earthquake List" process of the High Court in Christchurch.

[5] In summary, the LCM Agreement is a litigation funding agreement incorporating a claim investigation and preparation process before proceedings (of any kind) are issued. It authorised CRSL "to undertake the Project and to act on the Client's behalf in relation to the Client's potential Claim as set out in the Agreement".

[6] The "Project" was defined as:

> … the Claim Investigation and the conduct of the Proceedings in order to achieve Resolution of the Claim, with the aim of maximising Settlement or judgement proceeds, net of Project Costs, in respect of the Claim as quickly as possible, having due regard to all risks, and, in particular, the Proceedings being unsuccessful.

[7] All capitalised terms in the above definition were also defined. "Proceedings" were defined as "…any and all processes to prosecute the Claim…" and included Court proceedings of various specified kinds.

[8] "Resolution" was defined as:

> … when all or any part of the Resolution Sum is received and where the resolution sum is received in parts or where there is more than one Proceeding, a "Resolution" occurs each time a part is achieved or in respect of each Proceeding.

[9] "Resolution Sum" was defined as:

> … the amount or amounts of money or the value of benefits for which the Claims are Settled or for which Judgement is given in favour of the Client in any Proceedings or for which (sic) the Client receives under its policy of insurance….

[10] "Step 5" in the Claims Process was "Retain lawyers and reports" and was described as "Case file goes to your Lawyer". "Step 6" was "Claim filed in court/case management process" and was described as "Lawyer files claim with High Court. Case management process commences (see next flow chart). Work commenced at steps 3 and 5 above".

[11] The LCM Agreement contained extensive provisions governing the intended conduct of the contemplated "Proceedings". Relevantly, it provided for:

(a) CRSL to assist the respondent (the Client) "to appoint the Lawyers to provide the Legal Work to the Client";

(b) CRSL to monitor the progress of the Proceedings and to communicate with the Lawyers in relation to the progress of the Proceedings;

(c) CRSL to provide information to the Lawyers in order to conduct the Claim Investigation;

(d) an agreement to be entered into between the Lawyers and the Client for the Lawyers to act as lawyers to investigate and prosecute the Claims (defined as an Agreement for Legal Services);

(e) the Lawyers to charge for legal costs in accordance with the Agreement for Legal Services;

(f) the Client to give day-to-day instructions to the Lawyers on all matters concerning the Claims and all Proceedings;

(g) in the event of any conflict between the Lawyers' obligations to the Client and the Lawyers' obligations to CRSL, the Lawyers' obligations to the Client to prevail;

(h) the Client to instruct the Lawyers to keep the CRSL fully informed of the progress of any Proceedings relevant to the Claims of the Client, without any such disclosure constituting waiver of solicitor-client privilege.

[12] As to the funding aspect, the LCM Agreement provided for:

(a) CRSL to fund all costs and expenses associated with the Claim Investigation and Proceedings (defined as "Project Costs"), except only High Court filing fees;

(b) any sum received from EQC or the insurer to be paid into the Client's lawyers' trust account;

(c) any Resolution Sum received from EQC or the insurer at any time to be applied first in reimbursement of the Project Costs funded by CRSL and secondly in payment to CRSL of a commission equal to 20% of the Resolution Sum, plus GST (effectively 23% to a private individual such as the respondent).

[13] Lawyers' fees were part of the Project Costs and consequently were funded by CRSL.

[14] The LCM Agreement included express rights of termination by either party. CRSL was entitled to terminate on notice (without cause), in which case it remained bound to pay any accrued Project Costs and was entitled to reimbursement of them from the Client. The Client was entitled to terminate for "serious breach" by CRSL, in which case CRSL remained bound to pay any accrued Project Costs and was not entitled to be reimbursed for them.

[15] Apart from the circumstance of CRSL terminating the LCM Agreement, CRSL received nothing if there was no "Resolution" of the Claim i.e. if no payment was received from EQC or the insurer.

[16] The applicant was one of the two main lawyers with whom CRSL had a referral relationship. In August 2016, CRSL provided the respondent with website links to the two lawyers and recommended she select one of them to represent her.

[17] There was then email correspondence between the respondent and a CRSL representative about the respondent's assessment of the two recommended lawyers, based on the information made available by CRSL and the respondent's perusal of news media reports she found about the applicant's track record in dealing with earthquake claims.

[18] Although the LCM Agreement implicitly contemplated a client being able to engage any lawyer of the client's choice, that alternative was not raised in CRSL's email correspondence.

[19] The respondent engaged the applicant. On 18 August 2016, the applicant sent the respondent an engagement letter to which was attached:

(a) in Appendix A, a summary of the instructions the applicant had received from CRSL on behalf of the respondent, namely to commence legal proceedings against EQC and the insurer;

(b) in Appendix B, an "information for clients" sheet setting out the client care information required by the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules);

(c) in Appendix C, the applicant's "standard terms of engagement" as a lawyer;

(d) a draft statement of claim in the contemplated High Court proceedings;

(e) an invoice for the High Court filing fee.

[20] Clause 1 in Appendix B recorded that "[t]he basis on which fees will be charged is set out in the letter of engagement" and clause 2.1 in Appendix C recorded that "[t]he fees we will charge or the manner in which they will be arrived at are set out in our engagement letter".

[21] The engagement letter proper did not record anything about the basis on which fees would be charged but in Appendix A, against the heading "Preliminary Fee Estimate", the applicant recorded that "Our fees are paid in accordance with your Claims Resolution Service agreement once your claim is successful".

[22] The upshot of these arrangements was, relevantly, that:

(a) the respondent did not have to fund any costs except Court filing fees;

(b) CRSL had to fund all Project Costs, as defined, which included legal fees;

(c) the respondent remained in control of the giving of instructions to the applicant as her lawyer;

(d) if but only if a Claim was successful and EQC or the insurer made a payment and only once that happened, CRSL was entitled to be reimbursed and to receive its commission;

(e) if a Claim was unsuccessful or if the payment received was less than the Project Costs, CRSL bore the resulting loss;

(f) the only circumstance where the above arrangement did not apply was where CRSL terminated the LCM Agreement.

[23] This was apparently described in CRSL's marketing materials as a "No Win, No Pay" arrangement, which appears to be entirely accurate, other than in the last circumstance.

[24] As noted above, the applicant sent the respondent a draft statement of claim on 18 August 2016. On 22 August 2016, the respondent replied with "point-by-point" comments on the draft, there were further email exchanges about various factual details pleaded in the draft statement of claim and an amended draft was prepared on 23 August 2016.

[25] The applicant also sought clarification, before signing and returning the letter of engagement, of the applicability to her of the provisions of the respondent's standard terms of engagement about the payment of fees, disbursements and expenses. On 23 August 2016, the applicant clarified that the provisions relating to expenses and disbursements "… do not apply to you by reason of your CRS agreement".

[26] Procedural steps and legal work from the point that are evident from the applicant's time recording system, in which his employed lawyers recorded time but he did not, included:

(a) in September 2016, finalising and filing the statement of claim and preparing initial disclosure and documents for service on the defendants;

(b) receiving, reviewing and reporting on the defendants' statements of defence in October 2016;

(c) work on discovery of documents and reviewing the defendants' discovery in December 2016;

(d) preparation of a bundle of documents for the first case management conference (CMC) in December 2016 and attendance at the CMC;

(e) arranging site visits (presumably of specialist advisers) in December 2016 and January 2017;

(f) sundry correspondence through to April 2017;

(g) work on experts reports, witness statements, costings and court memoranda in July – November 2017;

(h) attendances regarding "second opinions" and fresh costings in November 2017 – February 2018;

(i) work in February 2018 relating to preparation for and attending a court teleconference on 19 February 2018;

(j) attendances and correspondence regarding calculation of "2B" scale legal costs in March – April 2018.

[27] A core issue in the claim was a material difference in the engineering assessments recorded in a joint engineering report prepared in August 2017. The engineers agreed that most of the issues with levels in the house were due to long-term subsidence resulting from poorly compacted fill and that resulting damage to the house

pre-existed the earthquakes. They disagreed about the degree of foundation repair/reinstatement work required to meet the insurer's policy obligations. The respondent's engineer said in essence that the entire house needed fresh foundations whereas the defendants' engineer said that only the eastern portion of the house needed fresh foundations as a result of the earthquakes.

[28] One of the case preparation issues was that the applicant requested the respondent to obtain evidence from friends and family about the pre-earthquake condition of the house and the respondent objected to having to be involved in obtaining such evidence. I infer that this process took some time.

[29] It appears from correspondence between the respondent and CRSL that her relationship with CRSL began to sour from December 2017, initially over a modest expert adviser's invoice for a "second opinion" that was sent to her in error and an associated concern about the quality of the work done by a quantity surveyor engaged or employed by CRSL that had apparently prompted the engagement of the expert who had rendered the invoice.

[30] The respondent objected to being responsible for the cost of work that she considered had been incurred only because the initial work was not done properly. She stated:

> … you are supposed to be acting on my behalf, be on my side as it were, unfortunately with recent events I now feel I have lost faith in your company.

[31] This led to further correspondence with CRSL in which the respondent expressed in various ways a lack of confidence in the specialist advice given by the mainly engineering advisers engaged by CRSL. There is no reference in that correspondence to any concern about the applicant's legal services.

[32] An email from the respondent's to CRSL's General Manager on 4 February 2018 is revealing as to how the respondent was feeling at that point. She commented that she "… felt that EQC, Southern Response and their other cohorts were trying to cheat me". She stated that "… my house became what I considered unstable and I really needed an honest opinion as I no longer trusted what I was being told and, more importantly, my mother and I did not feel safe".

[33] She stated further that "I was told [by CRSL] we had a case and was led to believe it would be a total rebuild". She went on to state that "CRS took this case on a no win, no fee basis but I would obviously never have agreed to that had I not been led to believe there were major problems and it was going to require a total rebuild". She referred to being "… notified down the track … that my house wasn't a total rebuild after

all" and of the defendants' expert's stated opinion that the house merely required "minor repairs to the internal lining and external cladding".[1] She complained about CRSL's communications with her.

[34] CRSL's General Manager responded as follows:

> The most effective way to fight EQC and your insurer, if they do not agree with our assessment of the damage to your house, is with court action, which requires lawyers. We therefore handed your case on to [the applicant]. Any update we could give you would come from information they provided us, so we generally leave them to update the client directly.
>
> We are prepared to go into battle on your behalf, which is why we are paying the expenses of your claim. There was always going to be some things you need to do, such as getting statements from your friends, as that simply makes more sense than us trying to get them to do it. You also know the issues with the house far better than any party who can only visit the property for a few hours. The other side's experts … will always minimise the damage as that saves their side money.
>
> I believe we are doing what we said we would, and we will continue to fight for the best possible settlement for you. While that may not be a complete rebuild, it will be a lot more than you would have achieved without our assistance.

[35] This exchange, which was copied to the applicant, appears to have coincided with the applicant's firm engaging with the respondent about the Court timetabling matters and to have prompted the respondent to turn her focus to the progress of the Court claim.

[36] On 16 February 2018, she emailed the applicant making several critical comments mainly about the time the proceedings were taking, apparently in response to her receipt of a memorandum the applicant or his staff had prepared for a Court teleconference scheduled for 19 February 2018 relating to the Court timetable.

[37] Relevantly, the respondent had this to say:

> The wording of this concerns me as I know from bitter experience, it is allowing more delays, there seems to be no end in sight, no light at the end of the tunnel - this case is dragging on and on and on and it is now looking to me as though [the applicant's firm] is allowing this. I understand there are certain procedures that have to be followed, but, I am of the opinion that EQC & Southern Response should have been given the ultimatum about it being 'set down for trial' last year, when they used their delaying tactics on October 6th. If you check my emails I have continually asked why they are being allowed to get away with all these deferments, in this respect, I feel that your firm has been negligent.

[38] She asked a question about whether the applicant's fees came out of CRS charges and relevantly added:

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[1] This appears to be a misinterpretation of a comment in the engineers' report about remediation work that was the responsibility of EQC rather than the insurer.

> I truly believed that by February it would be all wrapped up. Your firm notifies me as and when something changes, but I actually now feel knowing all I do, that both CRS and [the applicant's firm] have been derelict in their duty to me - you have failed to inform me exactly how long the entire process would take. Both your law firm and CRS have handled enough cases to be able to advise maybe not the exact period of time, due to each case being slightly different but a more concise one than I have been led to believe - 1 year to eighteen months. More pressure should have been exerted far sooner!
>
> I await your firm's comments.

[39] The Court teleconference occurred on 19 February 2018. The Court minute evidences that the applicant was successful on the respondent's behalf in opposing an attempt by the defendants to defer the case being set down for trial although the defendants were given three weeks to file fresh costing evidence.

[40] The applicant replied on 7 March 2018 to the respondent's 16 February 2018 email in the following terms:

> I have read your email 16 February 2018. You allege that we have:
>
> 1. Allowed delays to occur with the proceeding;
>
> 2. Been negligent;
>
> 3. Been derelict in our duties.
>
> We deny your allegations. In the circumstances of your allegations we cannot continue to act for you.
>
> Attached are draft notices of change for you to complete depending on your choice of future representation.
>
> If you do not complete and file/serve the notices by 14 March 2018 we will make an application to the Court.

[41] This unfortunate exchange of correspondence was the trigger for the subsequent difficulties between the respondent and the applicant.

[42] On 8 March 2018, the applicant invoiced CRSL for his fees for acting for the respondent.

[43] On 9 March 2018, the respondent emailed the applicant to "… request more time to complete and file the so called 'notices' you have mentioned in your email [of 7 March] as I need to seek advice".

[44] On 12 March 2018, CRSL's General Manager wrote to the respondent stating:

> We have received an invoice from [the applicant] for $[redacted] for legal services on your claim…. He has also advised that he has ceased to act for you.

> CRS is prepared to continue to fund your claim, if you wish to appoint a replacement lawyer. We are able to give you some recommendations if required.
>
> If you wish to challenge [the applicant's] fees, you are free to do that, and there is information on the Law Society website on how to approach that, at www.lawsociety.org.nz

[45] On 13 March 2018, the respondent emailed the applicant (but not CRSL) stating:

> As you did not respond to my email of the 9th March requesting more time, I am informing you that I do not wish for you to apply for a lawyer on my behalf, if that is what you meant below – I will find one myself.

[46] Also on 13 March 2018, one of the applicant's staff members sent three emails to the respondent about various aspects of the Court process. One of these was an email from EQC's lawyer attaching a costing filed by EQC pursuant to the 19 February Court minute which provided for remedial work by EQC on the respondent's home at an estimated value of $27,300.

[47] On 20 March 2018, there was a Court teleconference. This appears to have occurred initially pursuant to the Court's 19 February 2018 minute about setting the case down for hearing but I infer that it was also prompted by the applicant filing an application for leave to withdraw from representing the respondent in the proceedings. The Court granted the applicant leave to withdraw.

[48] The respondent attended the Court teleconference representing herself and was advised by the Associate Judge to request her file from the applicant. She did so that day and, on 23 March 2018, the applicant sent her by email a link to a Dropbox folder containing her file records.

[49] There does not appear to have been any further contact between the applicant and the respondent until November 2021.

[50] In the meantime, there was ongoing correspondence between the respondent and CRSL about various matters including costs and ongoing legal representation for the respondent in the Proceedings, which CRSL intermittently pressed the respondent to make a decision about.

[51] On 19 April 2018, the respondent asked CRSL's General Manager to email her a copy of her file with CRSL. On 24 April, the respondent repeated the request, this time as a formal information request under the Privacy Act 1993. On 25 April, the respondent asked CRSL for "…a copy of [the applicant's] invoice and also a breakdown of fees under the Agreement to date".

[52] On 26 April 2018, the CRSL General Manager replied to the respondent's 24 April email saying that the file "… will be available upon payment of our invoice, which I am currently preparing". The respondent has produced an invoice for Project Costs from CRSL addressed to her dated 26 April 2018.

[53] On 27 April, the General Manager replied to the respondent's 24 April email attaching a spreadsheet and stating:

> I attach a spreadsheet which shows how [the applicant] has calculated his charges. It is not based on his hours spent, but on the stage of your claim and the legal process.
>
> Our agreement with [the applicant], and our other lawyers, is that they charge our clients what are called 2B costs. These other costs that are awarded for the unsuccessful party to pay to a successful party in a court case, and are based on the steps taken in the process. The steps are numbered, and some steps may occur multiple times, as in Conferences, which allow for preparation, filing memos in lieu of personal appearances, or appearing in person.
>
> If you have any further questions, please let me know.

[54] On 4 May 2018, the respondent emailed CRSL stating she was "disput[ing] several things to do with the costings", which she specified (and which did not relate to the applicant's fees), and making clear that she was not expecting to receive an invoice for any costs until she achieved settlement.

[55] In reply on 8 May 2018, CRSL asked her to "… clarify your current position under our contract. I emailed you to say we would pay for a different lawyer, but you are now self-represented, [the respondent] advises".

[56] On 11 May 2018, the respondent relevantly responded that "I anticipate getting back to you shortly on whether I would like you to instruct another lawyer". It appears that she did not do so.

[57] On 18 September 2018, the CRSL General Manager emailed her again stating:

> Can you please advise your position with regards to our contract and your claim? This needs to be determined one way or the other, or we will cancel our contract with you, and render our invoice for the costs to date. The deadline for your decision is 30 September 2018.

[58] The respondent replied on 28 September 2018 stating:

> I wish to advise you that RAS[2] has been helping me and have provided further engineering. I need a bit longer to make a decision whether to continue with the proceedings or not.

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[2] "RAS" is the Residential Advisory Service, a division of a Government agency called the New Zealand Claims Resolution Service established to give policy holders advice about the resolution of insurance claims.

[59] The CRSL General Manager responded the same day: "Ok. Thank you for the update. Please keep me informed."

[60] It appears that the respondent kept deferring making a decision on the issue of legal representation while getting some advice from the community law centre. In the meantime, the respondent was in breach of the High Court timetabling order. In November 2018, the High Court made a fresh timetabling order and cautioned the respondent that non-compliance with it would sound in a costs order against her.

[61] On 5 March 2019, CRSL's General Manager made another attempt to progress the matter. He wrote:

> … can you please advise me where you are at with using us or not to complete your claim. If I do not hear from you within 14 days, I will assume we are no longer engaged and issue you with our account.

[62] On 18 March 2019, the respondent relevantly responded that "[t]he situation is dragging on and I am still unsure where things lie. I will hopefully be able to get back to you by next week". It appears that she did not do so.

[63] The respondent responded in substance to the CRSL General Manager on 28 April 2019. She first traversed numerous aspects of the technical history of her claim and the specialist advice she had received. She then turned to the matter of costs. I will quote the relevant part of her email because, although it was sent to CRSL and not to the applicant, it informs the apparent motivations behind some elements of the complaint she subsequently made against the applicant:

> On a similar note, you took my case on a "No Win, No Fee" basis. Furthermore, [the applicant] stated in an email dated 7 March 2018 that he ceased to act for me, though I always viewed [him] as part of your company, your lawyer. In an email dated 27 April 2018, you stated "our agreement with [the applicant], and our other lawyers (that should read lawyer because there was there was only two ever mentioned that you utilised, [redacted] being the other, which I now view as rather incredulous), is that they charge our clients what are called 2B costs". In other words he was part of the agreement but he broke it and he "ceased to act" without giving me enough time or an opportunity to take other advice. It was an absolute bombshell and came out of the blue. In the email of 7 March 2018, he also stated the following: "Attached are draft notices of change for you to complete depending on your choice of future representation. If you do not complete and file/serve the notices by 14 March 2018 we will make an application to the Court". [The applicant] had the advantage of being a lawyer but I was left struggling to cope not knowing what I should do, particularly as there was a teleconference call due any time from the 16 March 2018 – the bottom line was [the applicant] left me high and dry, it was all extremely stressful and overwhelming. [CRSL] offered to give me recommendations for another lawyer but by the stage I had lost complete and utter faith in your company as well. In the end, I was contacted by [redacted] from the court, telling me that Associate Judge [redacted] wished to discuss things with me on a telephone conference call – this was arranged for Tuesday, 20th March 2018. I am pretty sure that the

> Judge could tell I was bewildered by everything and he tried to assist me where he could.
>
> Therefore, due to my total distrust in your company and your methods, the way I see things at this time, is we just call it quits, with lessons being learned on both sides.

[64] It appears that CRSL did not respond to this email at the time.

[65] The respondent continued to represent herself in the proceedings and continued to fail to comply with the High Court timetabling orders. In August 2019, the Court stayed the proceedings for six months expressly to provide her with respite from the stress of the proceedings.

[66] Eventually, at the end of that six-month period, the Court transferred the proceeding to the Canterbury Earthquakes Insurance Tribunal (CEIT). In March 2020, it made a wasted costs order in favour of Southern Response. In doing so, it recorded that the respondent had by then failed on four occasions to comply with timetabling orders covering substantially the same ground.

[67] The respondent eventually engaged new counsel on legal aid in September 2020.

[68] In November 2020, the respondent through her counsel disputed her liability to pay any sum to CRSL. This appears to have been a pre-emptive strike, as she had no liability to CRSL at that time, no "Resolution" of her claim having yet been achieved.

[69] In December 2020, the respondent's counsel gave notice cancelling the LCM Agreement under the Contract and Commercial Law Act 2017 for alleged "repudiation" of it by CRSL 21 months earlier, the alleged repudiation being the CRSL General Manager's email of 5 March 2019.

[70] Counsel stated in his correspondence, relevantly, that EQC's position was that the cost of remedial works was $27,000, Southern Response's position was that it had no liability at all and the claim in the CEIT was not expected to be resolved until late 2021.

[71] The respondent has informed me that she received a payment on 27 September 2021, although not through the CEIT process. She did not say whether the payment was from EQC or Southern Response.

[72] CRSL made demand for payment of Project Costs by email on 28 September 2021. It is unclear to me whether the timing was a coincidence. The email was from a

CRSL director rather than the person the respondent had previously dealt with, the General Manager. CRSL also demanded payment of a substantial sum for interest.

[73] On 7 or 8 December 2021, the respondent reached a "full and final settlement" agreement with CRSL that provided for her to pay an agreed sum to CRSL towards Project Costs. The applicant was apparently a party to that agreement, which has not been disclosed. I have no information as to why he was a party to it. I note from the settlement amount that CRSL must have abandoned any claim for interest on Project Costs or for its commission.

[74] The respondent's complaint was dated 10 January 2022.

**The complaint**

[75] I identify 12 different elements of the respondent's complaint, as follows (using my expression of each item rather than the respondent's expression of them):

(a) Charging unreasonable fees;

(b) Charging excessive interest;

(c) Failure to advise on the LCM Agreement;

(d) Failure to attempt to negotiate settlement;

(e) Misleading conduct, including as to costs recovery;

(f) Deceptive conduct;

(g) Not achieving an outcome;

(h) Ceasing to act without good cause.

(i) Conflict of interest by reason of having a "joint venture" with CRSL, or being otherwise improperly connected or associated with CRSL;

(j) Putting the legal profession into disrepute by reason of involvement with CRSL;

(k) Unprofessional conduct.

[76] I have set them out in a logical order for discussion rather than in the order they were raised in the complaint. I note at this point that the respondent did not complain about the applicant having any responsibility for delays in the Court proceedings. This

is despite the assertions made in her email of 16 February 2018 that he had failed to counteract delays by the defendants.

[77] As outcomes of her complaint, the respondent sought for the applicant:

(a) to be reprimanded "in the strongest sense";

(b) to be fined;

(c) to be ordered to undertake further training or education;

(d) to be ordered to apologise;

(e) to pay the respondent compensation for stress and anxiety.

**The Standards Committee decision**

[78] The Standards Committee delivered its decision on 29 September 2023. It initially identified the main issues (in the manner I have expressed them above) as the alleged charging of unreasonable fees, charging excessive interest, failing to advise on the LCM Agreement, ceasing to act without good cause and acting in a conflict of interest situation.

[79] I acknowledge that it was not easy for the Committee to isolate the material complaints made against the applicant. The main reason for this was that many of the respondent's complaints and criticisms were in substance against CRSL but she persistently treated CRSL and the applicant as being indistinguishable and/or held the applicant responsible for perceived deficiencies in the services provided by CRSL.

[80] I have had the same difficulty and have decided that it is more transparent to identify all the 12 different elements of the complaint listed above and to determine who (as between CRSL and the applicant) they are properly directed against in the discussion of each separate element, as well as discussing the additional issues identified by the Committee.

[81] In relation to the first three issues identified by the Committee as being relevant to the applicant, it decided it had no jurisdiction to consider the alleged over-charging and did not expressly address either the alleged charging of excessive interest or the alleged failure to advise on the LCM Agreement.

[82] In relation to the allegation of ceasing to act without good cause, the Committee found that the applicant had properly terminated the retainer in compliance with his obligations under r 4.2(c) the Rules.

[83] Its discussion of the application of r 4.2(c) nevertheless led the Committee to consider the applicant's compliance with r 5.11 of the Rules as to advising the respondent to seek independent advice on becoming aware that she might have a claim against him. The Committee found that the applicant had breached r 5.11 in the circumstances.

[84] The Committee then focused on various aspects of the respondent's allegation of conflict of interest on the applicant's part and her related allegation of "bringing the law into disrepute" by reason of his alleged association with CRSL. I will discuss the Committee's analysis and factual findings later in this decision.

[85] The Committee determined that the applicant had engaged in unsatisfactory conduct by reason of breaches of rr 5.4, 5.4.1, 5.11 and 6 of the Rules for which it censured him, fined him and ordered him to pay costs. It also made an order for publication of the decision including the applicant's name, subject to New Zealand Law Society (NZLS) Board approval, but acknowledged that its publication decision would fall away if the review application was successful.

**Application for review**

[86] In his application for review dated 27 October 2023, the applicant submitted that:

(a) the Committee's finding of breach of r 5.11 could not be reconciled with its finding of compliance with r 4.2 and was wrong;

(b) the Committee's finding of breach of r 5.4 was wrong as there was no conflict of interest;

(c) the Committee's finding of breach of r 6 was wrong as there was no evidence of his having any conflicting or competing obligations and he had no such obligations;

(d) the finding of unsatisfactory conduct was consequently not supportable;

(e) the penalties imposed were excessive, disproportionate to the conduct in issue, inconsistent with previous decisions, premised on misstatement of his disciplinary history and imposed in procedural error by reason of failing

to hear and consider submissions on the issue after first making conduct findings.

[87] In support of some of his submissions, the applicant made reference to decisions of the High Court and Court of Appeal respectively in *Claims Resolution Service Limited v Pfisterer & Anr*[3] and *Pfisterer v Claims Resolution Service Limited & Anr*.[4] In those decisions dated May 2021 and October 2023 respectively, the relevant Courts analysed at considerable length various legal aspects of the relationship between CRSL and its clients and between CRSL and the lawyers engaged by its clients on CRSL's recommendation.

**Review on the papers**

[88] Section 206(2) of the Lawyers and Conveyancers Act 2006 (the Act) allows a Legal Complaints Review Officer (LCRO or Review Officer) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[89] After undertaking a preliminary appraisal of the file, I formed the provisional view that this was the most appropriate method of conducting the review and gave the parties opportunity to comment, as required by s 206(2A) of the Act. Both parties agreed with this course of action.

[90] I also issued two minutes in which I sought clarification from the applicant about some of his evidence about his agreement with CRSL and then clarification of several apparent discrepancies and contradictions in his responses to my queries. The applicant's answers did not greatly assist me. I subsequently sought and received submissions from the respondent on the potential application of two provisions of the Rules that had not been addressed in the Committee's decision.

[91] Having carefully read the complaint, the response to the complaint, the Committee's decision, the submissions filed in support of and in opposition to the application for review, the applicant's answers to my written queries and his subsequent submissions, there are no additional issues or questions in my mind that necessitate any further submission from either party. On the information available to me, I have concluded that the review can be adequately determined in the absence of the parties.

[3] [2021] NZHC 1088.
[4] [2023] NZCA 511.

**Nature and scope of review**

[92] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[5]

> … 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.

[93] More recently, the High Court has described a review by this Office in the following way:[6]

> 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.

[94] 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 consider all the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials. The material available to me does not include the applicant's file.

**Issues on review**

[95] The applicant has naturally challenged only the Committee's adverse findings. Nevertheless, the review is "de novo", which means "from the beginning". All issues raised by either party are therefore 'live' on review.

[96] In this instance also, the Committee identified some complaint particulars that it did not expressly address in its decision. I need to consider how those matters should

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[5] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].
[6] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

be addressed on review. I am also obliged to consider any complaint particulars the Committee did not deal with in its decision, to the extent that they relate to alleged conduct of the applicant rather than CRSL, although not necessarily to make any final decision on any such issue.

[97] The issues for consideration on review are:

(a) Am I able to consider the over-charging complaint?

(b) If so, is the over-charging complaint made out?

(c) Did the applicant charge excessive interest?

(d) Did the applicant fail to advise the respondent on the LCM Agreement and, if so, was this a breach of any applicable professional duty?

(e) Did the applicant breach his professional duty to provide, in advance and in writing, information on the principal aspects of client service?

(f) Did the applicant fail to attempt to negotiate settlement and, if so, was this a breach of any applicable professional duty?

(g) Is there any evidence of the applicant engaging in misleading conduct, including as to his advice on the recovery of costs?

(h) Is there any evidence of the applicant engaging in deceptive conduct?

(i) Did the applicant breach any professional duty in ceasing to act for the respondent?

(j) Did the applicant fail to advise the respondent to seek independent advice in breach of r 5.11?

(k) Is there any evidence that the applicant failed to achieve an outcome of the respondent's claim?

(l) Did the applicant have a "conflict of interest" when acting for the respondent?

(m) Is there any evidence that the applicant "put the law (or the legal profession) into disrepute" by reason of his "involvement" with CRSL?

(n) Are there grounds and good reason for a finding of unprofessional conduct to be made?

(o) Were the penalties imposed by the Committee excessive, disproportionate to the conduct in issue, inconsistent with previous decisions, or premised on misstatement of the applicant's disciplinary history?

(p) Did the Committee err procedurally by failing to hear and consider submissions on the issue of penalty after first making conduct findings?

**Discussion**

*(a) Am I able to consider the over-charging complaint?*

[98] The respondent's first complaint particular was expressed as follows:

> I would have liked to request a "costs review" to see whether you consider the amount I was charged by [the respondent] was reasonable, particularly because the estimate of 2B costs recorded came to $[redacted] and differed significantly to time recorded on the file. Neither the contract nor the letter of engagement mentioned 2B costs anywhere. The time record documented that just over 50 hours of time was recorded by junior solicitors. I know that junior solicitors do not command the same fees as a more qualified individual, and I believe that I was considerably overcharged in light of their inexperience, therefore I felt that these costs needed to be investigated.

[99] I acknowledge the deliberate way in which the respondent expressed this aspect of her complaint. The "would have liked" phraseology is clearly a reference to the fact that she had entered into a "full and final settlement" of all financial aspects with both CRSL and the applicant the previous month. She would not have been aware of the regulatory impediment identified by the Committee.

[100] The right to complaint about a lawyer's fees, if applicable, is nevertheless given by statute and is not negated by prior entry into a "full and final settlement" of the issue. The fact that such an agreement has been entered into is nevertheless potentially relevant to an assessment of the fairness and reasonableness to both parties of the fees charged.

[101] I take a different view from the Committee on the regulatory aspect and propose to discuss both the technical position and the substance of the fees complaint.

[102] The regulatory aspect identified by the Committee is that Reg 29 of the Lawyers and Conveyancers Act (Complaints Service and Standards Committees) Regulations 2008 prohibits a standards committee from dealing with a complaint about a bill of costs rendered by a lawyer more than two years prior to the date of the complaint unless it considers there are "special circumstances".

[103] The complaint was made much more than two years after the date the invoice was rendered, the Committee did not consider there were any "special circumstances" and therefore decided it could not consider the over-charging complaint.

[104] In my view, the circumstances giving rise to the complaint were certainly unusual in that, in summary:

(a) The invoice was dated 8 March 2018.

(b) It was rendered to CRSL, not to the respondent.

(c) There has never been any suggestion that the respondent was liable for payment to the applicant.

(d) The respondent was conditionally liable to CRSL for the amount of the invoice pursuant to the LCM Agreement, as part of her "Project Costs".

(e) CRSL advised the respondent of the amount of the invoice by email on 12 March 2018.

(f) In the same email, CRSL advised the respondent of her right under the Act to challenge the amount of the fees and referred her to the relevant information available on the NZLS website.

(g) On 25 April 2018, the respondent requested a copy of the applicant's invoice to CRSL and a "breakdown of fees".

(h) On 26 April 2018, CRSL issued an invoice to the respondent for Project Costs, which included the applicant's fees;

(i) On 27 April 2018, CRSL sent the respondent the requested copy of the applicant's invoice and breakdown of fees in a spreadsheet and advised the respondent of the basis on which the fees had been calculated.

(j) The respondent's liability was conditional, in that she was liable to pay it only if either:

    (i) there was a "Resolution" of her Claim, as defined; or

    (ii) CRSL terminated the LCM Agreement in accordance with the LCM Agreement.

(k) The concern the respondent expressed to the applicant at the time, leading to his termination of the retainer, was about her perception of delay in the progress of the proceedings and her belief in the applicant's responsibility for that perceived delay.

(l) She did not express any concern at that time about the value of the legal work done, her expressed concerns to CRSL being about the quality of the engineering and quantity surveying aspects of the investigation by CRSL.

(m) CRSL made several attempts to get the respondent to engage about progressing her claim and about engaging new lawyers to do so.

(n) On 5 March 2019, CRSL emailed the respondent in the terms set out in paragraph [61], which I interpret as another attempt to persuade the respondent to engage.

(o) The respondent duly did so, albeit in a non-committal way, and CRSL did not give notice of termination of the LCM Agreement.

(p) The respondent then sent her critical email of 28 April 2019.

(q) The next formal steps in the contractual relationship between the respondent and CRSL were the respondent's counsel's letters to CRSL in November 2020 disputing her liability for payment of Project Costs (for various reasons) and in December 2020 cancelling the LCM Agreement for CRSL's alleged "repudiation" of it 21 months earlier.

(r) CRSL made demand for payment of Project Costs and allegedly accrued interest on 28 September 2021, the day after the respondent received a payment.

(s) The payment was apparently a final one, as the respondent filed a notice of discontinuance in whatever proceeding she was pursuing on 11 October 2021.

(t) The respondent, through counsel, disputed CRSL's demand on 30 September 2021. The dispute was settled on 7 or 8 December 2021.

(u) The respondent's complaint to the NZLS was dated 10 January 2022.

[105] The respondent's arguable right to dispute the amount of the invoice arises under s 132(2) of the Act, which relevantly provides that:

> Any person who is chargeable with a bill of costs, whether it has been paid or not, may complain to the appropriate complaints service about the amount of any bill of costs rendered by a practitioner … (being a bill of costs that meets the criteria specified in the rules governing the operation of the Standards Committee that has the function of dealing with the complaint).

[106] The wording in brackets is a reference to Reg 29, which imposes the two-year time limit from the date the invoice is rendered. There are three resulting issues, in my view:

(a) whether the respondent was "chargeable with" the applicant's invoice when she made her complaint;

(b) whether the time limit in Reg 29 applies;

(c) if so, whether the unusual circumstances summarised above constitute "special circumstances" in terms of Reg 29.

[107] The first issue is not straightforward. The respondent was not a person "chargeable with" the applicant's invoice when it was issued in March 2018. She had no liability to pay it. His claim for payment was solely against CRSL and her contingent liability for payment, if any, was solely to CRSL.

[108] Nor did the respondent become "chargeable with" the applicant's invoice when CRSL issued its invoice to her (incorporating the legal fees) on 26 April 2018. The issuing of an invoice is necessarily a demand for payment but she had no liability to pay it at the time.

[109] CRSL did not at any time purport to terminate the LCM Agreement. On the contrary, it left the Agreement on foot apparently in the hope or expectation that the respondent would eventually decide to progress her claim. Even her counsel's correspondence does not suggest that CRSL had terminated the LCM Agreement.

[110] CRSL could well have treated the respondent's email of 28 April 2019 as repudiation for the purposes of the Contract and Commercial Law Act 2017 (the CCLA) and cancelled the LCM Agreement on that ground but did not do so.

[111] In a much later email on 19 November 2021 sent in the context of the dispute over interest, CRSL's General Manager did claim that CRSL's "obligations were terminated" on 19 March 2019 by virtue of the wording of his email of 5 March 2019,

which required a response within 14 days. He did receive a response within 14 days and the matter was expressly left open.

[112] Nor did the respondent allege through counsel that CRSL was in "serious breach" of the LCM Agreement, thus triggering a contractual right of termination. The ground relied on for termination by the respondent, which was under the CCLA rather than under the agreement, was the alleged repudiation of the agreement by CRSL in March 2019.

[113] I acknowledge that interpretation of the LCM Agreement and the legal effect of the correspondence are legal issues that are properly the province of a Court. I nevertheless need to come to a view of the matter for the purposes of this review in order to make a finding on this aspect of the complaint.

[114] The view I come to is that the respondent had liability to pay the legal costs only if and when "Resolution" of her claim was achieved. Given the self-evident purpose of s 132(2) of the Act, nothing turns on the fact that the respondent's liability at the time of "Resolution" would be to CRSL rather than to the applicant.

[115] "Resolution" was not achieved through the High Court proceedings because the respondent failed to prosecute those proceedings and they were transferred to the CEIT by Court order. According to the respondent, it was not achieved through the CEIT either. Resolution could nevertheless be achieved in any manner. The respondent's receipt of payment on 27 September 2021 constituted "Resolution" on that date.

[116] It therefore seems that the respondent became "chargeable with" a bill of costs, albeit indirectly by reason of the Project Costs liability to CRSL, on 27 September 2021. This was less than four months before she made her complaint.

[117] Reg 29 unfortunately does not contemplate such an unusual scenario. The regulation is premised on the understandable assumption that an invoice is normally payable by the person to whom it is rendered. This is not always the case, however, and there are other, more common situations in which some other person becomes "chargeable with" an invoice. The most common such situation is probably that of a guarantor.

[118] It is not unusual for a guarantor to become aware of a liability for a legal fees invoice only once demand has been made on the guarantor for payment and this can occur more than two years after the invoice was rendered. In that scenario, the "special circumstances" exception to Reg 29 can be called in aid to allow the guarantor to dispute the fairness and reasonableness of the fees.

[119] The respondent's situation is dissimilar in terms of her knowledge. She was aware of the invoice and its amount from March 2018 and had a copy of it. She was expressly advised of what CRSL considered to be her right to challenge the amount of the invoice under the Act. I am not sure that CRSL was correct about that. As the respondent was not at that time "chargeable with" the invoice for the reasons I have discussed, it is debatable whether a standards committee would have considered a fees complaint at that time. Nor did any payment liability arise when the respondent received CRSL's 26 April 2018 invoice.

[120] In my view, the respondent cannot be left in a situation where she could not make a fees complaint within two years after the date of the invoice because she was not yet liable to pay it, directly or indirectly, and also could not make a fees complaint after such liability arose because that was more than two years after the invoice was rendered (to a different person, CRSL).

[121] I therefore find that the prohibition in Reg 29 does apply, as the complaint was made more than two years after the invoice for which the respondent eventually became chargeable was rendered, but that the unusual circumstances described above constitute "special circumstances" for the purposes of Reg 29 and that the complaint of over-charging can therefore be considered.

*(b) Is the over-charging complaint made out?*

[122] The normal procedure of this office where a Review Officer comes to a different view from the Committee on a technical matter such as the application of Reg 29 is to refer the issue back to the Committee for reconsideration. I do not propose to do that for the following reasons:

(a) despite the length of the above discussion, this aspect of the complaint is a minor one in the context of the complaint as a whole;

(b) the respondent has properly acknowledged, albeit obliquely and not for any regulatory reason, that consideration of her fees complaint might not be appropriate;

(c) the global sum the respondent agreed to pay CRSL in December 2021 was approximately 78.5% of the total third-party expenses CRSL had incurred on her behalf to April 2019;

(d) the amount of the applicant's invoice consequently became of only historical interest at that point;

(e) regardless of all the above considerations, I consider it extremely unlikely that any standards committee could make a finding that the fees charged by the applicant for the legal work done to the point of termination of his retainer were unfair or unreasonable to the respondent;

(f) this is so even before the subsequent effective reduction in the respondent's liability resulting from the settlement agreement with CRSL.

[123] The regulatory principle, which is expressed in r 9 of the Rules, is that a lawyer must not charge a fee that is more than fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in r 9.1 of the Rules.

[124] Here, the relevant arrangement between the applicant and the respondent was that fees would be payable in accordance with the LCM Agreement. This meant that she had no liability to the applicant other than for High Court filing fees. The relevant arrangements between the applicant and CRSL were that:

(a) CRSL was liable to pay the applicant's fees;

(b) the applicant would charge CRSL for the steps taken in the Court proceedings the amount the defendants would be liable to pay under scale 2B of the High Court Rules on the assumption that the respondent was the successful party (referred to in the materials as charging "on a 2B basis");

(c) the applicant's fees were payable by CRSL regardless of the outcome of the respondent's claim.

[125] In my view, CRSL's fee calculation arrangement with the applicant was probably entered into by CRSL as agent for the respondent. (I comment later in this decision on the apparent differences between the LCM Agreement and the agreement at issue in the *Pfisterer* litigation).[7] If I am wrong in that view, I consider that the respondent nevertheless had the benefit of the arrangement between the applicant and CRSL for the purposes of s 12 of the CCLA.

[126] One the reasonable fee factors in r 9.1 of the rules is "any fee agreement … entered into between the lawyer and client". Under r 9.2 of the Rules, "the terms of any fee agreement between a lawyer and client must be fair and reasonable, having regard

[7] At [253]-[254] and [280] of this decision.

to the interests of both client and lawyer. The arrangement between the applicant and CRSL was such a "fee agreement", in my view.

[127] The benefits to the applicant of that arrangement must have included its simplicity and objectivity and the elimination of outcome-related risk and credit risk, in the context of a high volume of conceptually similar litigation referrals. It can be assumed that the applicant considered the terms of the to be fair and reasonable to him. The sole issue is whether they were fair and reasonable to the respondent, having regard also to the terms of the LCM Agreement.

[128] The applicant has submitted that the respondent "effectively benefits from my deal with CRS as she is only liable to pay CRS what CRS pays me which is 2B" but that she was not "designated" for the purposes of s 12 of the CCLA and therefore that the section did not apply. It seems to me that the respondent was necessarily a member of the "class" of persons who had the benefit of the arrangement, namely all CRSL clients who were referred to the applicant pursuant to the LCM Agreement(s), and that, if there were any evidential doubt that, the applicant's terms of engagement confirmed it. The legal point is not determinative of anything, however.

[129] If I am wrong in my view either that CRSL was agent of the respondent (and therefore that there was no "fee agreement" because the arrangement did not bind the respondent) or that s 12 of the CCLA does not apply (either because the respondent was not a "designated" person or member of a class or because she does not assert any benefit to her from the arrangement), r 9 of the Rules still applies and the resulting fee must be fair and reasonable to the respondent.

[130] The respondent's argument was expressed as follows:

> … the estimate of 2B costs recorded came to $[redacted] and differed significantly to time recorded on the file. Neither the contract nor the letter of engagement mentioned 2B costs anywhere. The time record documented that just over 50 hours of time was recorded by junior solicitors. I know that junior solicitors do not command the same fees as a more qualified individual, and I believe I was considerably overcharged in light of their experience, therefore I felt these costs needed to be investigated.

[131] The fact that the applicant would be charging CRSL on a 2B basis is an issue of information disclosure discussed elsewhere in this decision. It is not relevant to assessment of the fairness and reasonableness of the fee charged as a result of applying the 2B formula.

[132] The time recorded on the file by the employed solicitors is partially relevant in that it constitutes a record of some of the "time and labour expended", which is one of the thirteen reasonable fee factors set out in r 9.1 that need to be considered in a fees

assessment. It does not constitute a record of all the time and labour expended because it does not include the applicant's own time.

[133] There is no reason why the applicant would or should have recorded his own time, as the time spent on the file was irrelevant to the calculation of a fee as between the applicant and CRSL. It seems to me that the primary purpose for costing purposes of the recording of time by the employed lawyers was to have a record of the steps taken in the proceeding for which fees could be charged by reference to the 2B scale.

[134] Time recording by employed lawyers also has several internal management purposes that are important for any law firm regardless of any impact the data have for costing purposes.

[135] The respondent appears to make an implicit assumption that 'time spent at hourly rates' represents a default basis for reasonable costing of legal work against which any other basis must be measured. This is not so, commercially or in terms of rr 9 and 9.1, despite the widespread practice of most law firms to justify their fees based on time spent at hourly rates.

[136] In any event, no such comparison can be made here for the reason stated above. If one were to make such a comparison, the notional value of the applicant's own work on, oversight of and responsibility for a High Court claim over an 18-month period would amount to about $5,000. This could not on any analysis be considered unreasonable to the respondent.

[137] The suggestion that the respondent might have been over-charged for the work done by the employed lawyers is misconceived. She was not charged based on the time spent doing the work but for the completion of steps in the proceeding for a which a set sum is recognized under the High Court Rules governing the award of Court costs.

[138] There is no suggestion anywhere in the materials that the work was not completed competently and professionally. The respondent's only complaint against the applicant's firm, despite the unfortunate way in which she expressed it, was that the whole process was taking too long in comparison with her own expectations.

[139] Most fundamentally, however, the problem for the respondent with this aspect of her complaint is the assumption that the charging of legal fees on a 2B basis could possibly result in a higher fee than any other basis of fee calculation. I consider it extremely unlikely, to the point of near impossibility, that this could be so.

[140] Category 2 applies to "proceedings of average complexity requiring counsel of skill and experience considered average in the High Court". Band B is applicable where "a normal amount of time is considered reasonable" for a specified step in the proceedings. Overall, cost awards on a 2B basis are the norm in most High Court proceedings.

[141] Such cost awards are not intended to represent full costs recovery for the successful party, however. On the contrary, when the rates were set, the principle stated by the drafters of the legislation[8] was that "an appropriate daily recovery rate should normally be two-thirds of the daily recovery rate considered reasonably in relation to the proceeding …".

[142] This represents a policy view of the matter in 2016. In practice, it would be unusual (depending on the actual complexity of the proceedings) for an award of Court costs on a 2B basis to represent as much as two-thirds of actual legal fees charged on an arms-length commercial basis and very unlikely that they would represent any more than that ratio.

[143] I consider that no properly informed costs assessor or standards committee would find the charging of fees strictly on a 2B basis to be anything other than fair and reasonable to the respondent. The additional factors that make my assessment of the reasonableness of the arrangement compelling is that the respondent had no liability to pay anything during the course of the proceedings and no liability for fees at all unless and until "Resolution" of her claim was achieved.

[144] On any informed analysis, this was a "bargain basement" fee calculation mechanism and one in which the respondent had no risk in terms of outcome. All commercial risk was borne by CRSL. The commercial risk borne by CRSL included the inevitable cost of bringing a new lawyer "up to speed" on the case if the respondent had agreed to instruct one as part of the ongoing performance of the LCM Agreement.

[145] Accordingly, I find that the fees complaint aspect of the complaint is not made out.

[146] I add that the respondent's complaints of being "left in the lurch" and being forced to represent herself for the following 18 months because she could not afford legal representation until engaging new counsel on legal aid in September 2020 are not tenable on the facts. CRSL was contractually obliged to support the ongoing proceedings. Its General Manager made this clear, expressed no reservation about

[8] Rule 14.2(1)(d) of the High Court Rules 2016.

doing so and offered to recommend other lawyers (plural) for her to consider engaging. She could have made her own choice without consulting CRSL.

[147] If the respondent had decided to continue with the proceedings, it would not have cost her an extra cent to do so and would not have cost her anything at all (apart from filing fees) until "Resolution" of her claim was achieved.

[148] Objectively, it was unnecessary for the respondent to represent herself and unnecessary for her eventually to seek legal aid, with its inevitable repayment obligation. Once she eventually decided to engage a lawyer, CRSL was obliged to fund that lawyer's fees on a private basis.

*(c) Did the applicant charge excessive interest?*

[149] This is one of the elements of the complaint the Committee identified but did not address in its decision. The reason for this is straightforward. The applicant did not charge any interest. The respondent's dispute over the charging of interest was with CRSL. As discussed later in this decision, the respondent was simply wrong to treat CRSL and the applicant as the same person for the purposes of her complaint. I find there is no merit in this aspect of the complaint.

*(d) Did the applicant fail to advise the respondent on the LCM Agreement and, if so, was this a breach of any applicable professional duty?*

[150] The respondent's allegation was that:

> I signed the contract with CRS on the 31st May 2016 …. The contract with CRS had a cooling off period for 5 days but [the applicant] did not advise me on the consequences and implications of signing the contract with CRS.

[151] The obvious difficulty with this allegation is that the applicant did not act for the respondent in May 2016. Their first contact was two and a half months later, in mid-August 2016. The respondent does not explain how she could have expected the applicant to advise her on the LCM Agreement before she entered into it.

[152] Nor does the respondent articulate any aspect of the LCM Agreement that she did not understand and that it would have been appropriate for the applicant to have advised her about retrospectively once she had engaged him. The inference I draw is that this aspect of the complaint is linked with the respondent's position that the LCM Agreement was a "joint venture" between the three parties and gave rise to a conflict of interest on the applicant's part. I will discuss those issues later in this decision.

[153] Before leaving this topic, however, reference to potentially relevant comments in the Court of Appeal and High Court judgments in the *Pfisterer* litigation would be appropriate.[9] The applicant's evidence to the Committee was that his arrangements with CRSL regarding the respondent's claim were identical to his arrangements with CRSL regarding Mrs Pfisterer's claim. In the following quoted extracts, "the CRS contract" and "the CRSL contract" mean the agreement between CRSL and Mrs Pfisterer that was equivalent to (but not the same as) the LCM Agreement between CRSL and the respondent.

[154] The Court of Appeal made the following comment:[10]

> In relation to the CRS contract, Mrs Pfisterer signed it on 28 February 2014, having elected not to obtain independent legal advice regarding its terms. [The lawyer] was subsequently engaged in June 2014. It was therefore not part of his role to provide advice to Mrs Pfisterer as to whether she should enter into the CRS contract, as she had already done so. [The lawyer] could, however, have explained the terms of the CRS contract to Mrs Pfisterer, to make sure she understood it (and in the Judge's view, he should have done so).

[155] The last sentence is a reference to the following comment by Hinton J at High Court level:[11]

> I agree that [the lawyers] should have explained the terms of the CRSL contract to Mrs Pfisterer even though that contract had already been signed before [the lawyers were] instructed, to ensure that she understood its effect and it seems likely that they did not do so in full. However for the reasons already stated above, while that may have been a breach of duty, I do not consider it to have been a breach of fiduciary duty.

[156] Her Honour did not expressly articulate the nature of the professional duty the lawyer might have breached in not explaining the terms of the CRSL contract, or not explaining them in full. The context of the discussion with counsel that led to the comment being made, however, was the lawyer's failure to explain 2B costs and the fact that his fees would be charged by reference to them. The inference I draw is that the duty her Honour considered might have been breached was the duty under r 3.4(a) of the Rules, which is discussed below.

[157] For the same reason as was stated by the Court of Appeal in *Pfisterer*, I find that the applicant did not fail to advise the respondent on the LCM agreement.

*(e) Did the applicant breach his professional duty to provide, in advance and in writing, information on the principal aspects of client service?*

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[9] Mrs Pfisterer was declined leave to appeal the Court of Appeal judgment by a decision of the Supreme Court dated 5 March 2024.
[10] *Pfisterer v Claims Resolution Service Ltd*, above n 4, at [98].
[11] *Claims Resolution Service Ltd v Pfisterer*, above n 3, at [148].

[158] Rule 3.4(a) of the Rules relevantly provides that:

> A lawyer … must, in advance, provide in writing to a client information on the principal aspects of client service including the following:
>
> (a) the basis on which the fees will be charged, when payment of fees is to be made, and whether the fee may be deducted from funds held in trust on behalf of the client…".

[159] There is no dispute that:

(a) both Appendix B and Appendix C to the applicant's letter of engagement stated that the basis on which fees would be charged or the manner in which they would be arrived at was set out in the letter of engagement;

(b) the letter of engagement in fact contained no statement about the basis on which fees would be charged or the manner in which they would be arrived at;

(c) the engagement letter and appendices specifically contained no reference to the fact that the applicant had an arrangement with CRSL that all fees would be charged on a 2B basis;

(d) nor was this explained to the respondent by or on behalf of the applicant at any point during the 18 months that the retainer continued;

(e) all the letter of engagement stated was that "Our fees <u>are paid</u> in accordance with your Claims Resolution Service agreement once your claim is successful" (my emphasis);

(f) the only reference in the LCM Agreement to the basis on which legal fees would be calculated was in the definition of "Legal Costs", which was simply various costs "… charged by the Lawyers for performing the Legal Work under the Agreement for Legal Services…".

[160] The applicant submits that "[a]s set out in the Pfisterer notes of evidence and Court judgments CRS would have explained to Ms BQ that I and other lawyers charged CRS on a 2B basis that is a fixed fee for steps". I acknowledge that the substantial similarity between aspects of the claims in the *Pfisterer* litigation and the applicant's complaint might indicate a distinct possibility that reports of the former might have influenced the latter. Nevertheless, evidence about what CRSL personnel explained to Mrs Pfisterer (which Mrs Pfisterer unsuccessfully disputed) is not evidence about what they might have explained to the respondent.

[161] There is no evidence available from the CRSL employees the respondent dealt with between May and August 2018 as to the matters they discussed with her. In the absence of such evidence, I cannot assume that the respondent's evidence about the matter would hypothetically be disputed. I therefore consider it more likely than not that the fact that fees were charged by the applicant to CRSL on a 2B basis was first disclosed by CRSL to the respondent after the applicant terminated the retainer.

[162] It cannot be argued that r 3.4(a) was of no application just because the fees were charged to CRSL rather than to the respondent. Consequently, the findings I make are that:

(a) the applicant breached r 3.4(a) in failing to inform the respondent in advance and in writing (or at all) of the basis on which fees would be charged;

(b) the applicant thereby engaged in unsatisfactory conduct.

[163] I acknowledge and accept the respondent's submission that he has since amended the form of his letter of engagement for CRSL referrals to make clear that fees are charged on a 2B basis.

*(f) Did the applicant fail to attempt to negotiate settlement and, if so, was this a breach of any applicable professional duty?*

[164] The respondent's relevant comment in her complaint was as follows:

> I wondered why some kind of settlement had not been negotiated, instead of my claim being thrown into the court system more or less right away.

[165] Later, in replying to the applicant's response to the complaint, she stated:

> I hardly think that just over 10 weeks is enough time to resolve a claim, in reality it would have taken a lot more negotiations and consultations et cetera, and yet that is all the time given before [the applicant] filed my case in the Courts. Seems a bit premature on both CRS & [the applicant's] part.

[166] The relevant professional duty is set out in r 13.4 of the Rules as follows:

> A lawyer assisting a client with the resolution of a dispute must keep the client advised of alternatives to litigation that are reasonably available (unless the lawyer believes on reasonable grounds that the client already has an understanding of those alternatives) to enable the client to make informed decisions regarding the resolution of the dispute.

[167] There is no evidence before me that the applicant gave the respondent any advice about possible alternatives to litigation on receipt of the instructions given on her

behalf by CRSL or in the context of seeking her instructions on the draft statement of claim.

[168] By the same token, there is no information before me as to the steps the respondent had taken to pursue her claims with EQC and her insurer and then with Southern Response over the period of more than five years that had elapsed since the earthquakes and before engaging the services of CRSL. Clearly, however, she had not accepted EQC's initial assessment of the earthquake damage and her claim had not been resolved.

[169] In that regard, the respondent is eloquent regarding her view of the allegedly misleading and deceptive conduct engaged in by EQC and Southern Response and their appointed experts. The service offered by CRSL was to investigate the claim and to support her both technically and financially in pursuing it by way of High Court proceedings.

[170] The statement of claim in the proposed High Court proceedings was provided to the respondent for comment and she commented on it in some detail. It cannot be suggested that the commencement of the proceedings did not accord with her instructions. I reject her submission that the decision to issue proceedings was made by the applicant and that she had no say in the matter.

[171] The possibility of settlement by agreement through a Court-mandated process or by mediation was dealt with expressly as part of the "Earthquake List Court Process" set out in Schedule 2 of the LCM Agreement, which stated that "in most cases, the lawyers for the parties hold a settlement meeting at some time after the second CMC".

[172] The retainer appears to have been terminated two months before a scheduled CMC. Given that there was a Court teleconference in February, I infer that the May event was at least a third CMC. In any event, termination of the retainer occurred as a consequence of the respondent's criticisms of the applicant's performance.

[173] The wider context needs to be considered. The Christchurch earthquakes led to an enormous number of claims, a huge number of which were declined wholly or partly for various reasons but particularly construction defects, pre-existing damage and related material nondisclosures by insured people.

[174] In addition, there were numerous reports at the time of everything from incompetence to profiteering and outright fraud by those involved in the repair industry. It was not unusual for specialist scoping reports and resulting repair costings to be vastly different as between the experts engaged by insurers and insured people.

[175] It would be fair to observe that the overall dispute resolution system was overwhelmed by the Canterbury events. One of the systemic responses to this was the creation of the High Court Earthquake List process, with its largely standardised expectations in terms of process and timetabling for largely standard claims.

[176] Eventually, but not until June 2019, another systemic response was the establishment of the CEIT to provide a specialist, alternative, binding dispute resolution mechanism at lesser cost but with the drawbacks associated with that process (particularly the inability to claim legal costs).

[177] On the information available to me, I do not consider that a finding could be made that an alternative to litigation was reasonably available. In my view, it was as likely as not that the prompt commencement of High Court proceedings to resolve what seems already to have been an impasse, particularly on the advantageous terms offered by CRSL, would have been the fastest route to a Court-mandated settlement negotiation process.

[178] There is nothing in the materials to indicate that it might have been effective to engage in an alternative dispute resolution process before the point contemplated in CRSL's explanation of the Earthquake List process. If anything, the fact that Southern Response continued to maintain that it had no liability at all is indicative of the likely futility of a hypothetical alternative dispute resolution process at any earlier time. Of course, both my comment and the respondent's surmise are speculative and I also have no information as to the respondent's settlement expectations from her claim.

[179] I arrived at the above views before receiving the applicant's submissions on the issue. Those submissions were that:

> Any claim only got to me once alternatives to litigation were exhausted. My express instructions were to commence court proceedings. Direct communication with EQC/insurer did not produce an outcome. The terms of engagement record that is what I was asked to do.
>
> Post earthquakes suing EQC and insurers was in my experience the most effective method of progressing a claim. Owners got to take advantage of the Court earthquake list designed to fast track claims. It enabled owners to have more control and input into the process.
>
> Many Christchurch owners paid tens of thousands of dollars to lawyers and experts and achieved nothing. Suing in Court in the EQ list where legal fees were only 2B was very cheap and effective.

[180] There is nothing in those submissions that surprises me, except the comment about the terms of engagement recording what the applicant was asked to do. The instruction of course came from CRSL, not from the respondent. It is clear from the

respondent's evidence that the advice she was taking about the different ways that resolution of her claims might be achieved was being taken from CRSL, not from the applicant. The respondent might well have had a claim against the CRSL for the quality of that advice. If she did, she compromised it in December 2021.

[181] The advice CRSL either gave or failed to give the respondent did not absolve the applicant from his duty under r 13.4 of the Rules. There is no evidence to suggest that the applicant was aware of the oral advice the respondent had received from CRSL, although he must have been aware of CRSL's written explanation of the Earthquake List process including the probable availability of a negotiated resolution opportunity after the second CMC.

[182] Ultimately, the view I take is that:

(a) the evidence from the respondent is that the applicant gave no advice regarding alternatives to litigation and this evidence is not disputed by the applicant;

(b) there is no evidence that the applicant turned his mind to the possible availability of alternatives to litigation;

(c) there is no evidence that the applicant believed the respondent had an understanding of any such alternatives;

(d) consequently, the applicant breached r 13.4 of the Rules.

[183] The Committee apparently did not consider this aspect of the complaint to be sufficiently material in professional conduct terms to warrant a mention in its decision. I take largely the same view of the materiality of the matter. The respondent complains that she was not advised of reasonably available alternatives but does not suggest what those alternatives might have been and has made clear that the alternatives she subsequently explored were ineffectual.

[184] The ongoing pursuit of her Court claim had no immediate or long-term cost implications for her. The process was costing her nothing at the time and would ultimately have cost her nothing regardless of its outcome (in both cases except for filing fees). If it had been successful, the defendants would have been ordered to pay 2B costs. If it had been unsuccessful, CRSL was obliged to pick up the tab. A hypothetical alternative process, if successful, might ultimately have cost CRSL less but could not have cost the respondent less.

[185] Mediation, which is of course voluntary, by an appropriately experienced mediator and probably requiring the input of expert witnesses would not have been an inexpensive exercise. The respondent's half share of the cost would not have been recoverable from the defendants.

[186] The respondent at one point sought the assistance of the Greater Christchurch Claims Resolution Service (GCCRS), which is a Government-run service offering mediation and private expert determination services for earthquake claims. From the information available on the file including a negative comment by the respondent about the GCCRS, I infer that this avenue was of no material assistance to her.

[187] The respondent informed me that her claim was not resolved through the CEIT either. She did not inform me whether any other decision-making or mediating body was involved. She referred only to the efforts of her lawyer.

[188] On the information available to me, I consider that any reasonably available alternatives to litigation there might have been were unlikely to have had any reasonable prospect of achieving resolution of the respondent's claim on a basis she considered satisfactory but this plainly involves an assumption as to what the respondent might have considered satisfactory and one of the potential benefits of processes such as mediation is that parties' expectations about outcomes can be explored in a non-prejudicial way.

[189] Ultimately, this was a matter for her to assess and a decision for her to make. She could not make it without knowing what alternatives to litigation, if any, were available to her and it was the applicant's regulatory obligation (not CRSL's) to inform her of any such alternatives. He did not do so.

[190] I am conscious that the core evidential issue of the extent of pre-earthquake damage became clear only as a result of the expert engineering evidence generated as a result of the Earthquake List process, which was premised on the issue of Court proceedings. There is a "chicken and egg" issue. This is no doubt why the Earthquake List process contemplates potential settlement discussion after the second CMC.

[191] In all the circumstances, I find that the applicant's breach of r 13.4 of the Rules constitutes unsatisfactory conduct but that submissions would be appropriate as to whether that conduct is of a nature and degree of materiality that warrants any additional disciplinary order.

*(g) Is there any evidence of the applicant engaging in misleading conduct, including as to his advice on the recovery of costs?*

[192] The respondent made two relevant allegations in this regard. The first was that:

> It seemed to me that having been told my house was 'munted' and a total rebuild, the engineers employed by CRS/[the applicant] were not well enough qualified and could not back up their findings. I had no real understanding of how CRS/[the applicant] worked, at that point. Further along, I realised that I had been duped, totally misled and the only reason CRS and [the applicant] were in this business, was purely to make money for themselves.

[193] This allegation is plainly one of incompetence and/or misleading conduct against CRSL and/or the specialist engineering, building or quantity surveying advisers it engaged. It cannot be an allegation against the applicant. Counsel's letter to CRSL of 8 December 2020 makes clear, if clarification were necessary, that the allegation is against CRSL.

[194] There is no evidence before me to support the respondent's persistent assertions that CRSL and the applicant were in business together or that the applicant could have been in any way responsible for the quality of the specialist advice given or procured by CRSL. Consequently, I find that the first allegation of misleading conduct is not made out.

[195] The second allegation of misleading conduct is expressed as follows:

> [The applicant] did not secure any award of costs for me in the High Court and I was told that expert and legal costs would be covered by EQC and Southern response; to my horror, this too turned out to be a fabrication. This meant that not one, but two organisations had misled me, EQC/Southern Response and CRS – I originally had faith in both but realised I was sadly mistaken in doing so…. I have gone through hell for six and a half years due to EQC/Southern Response's deceit and [the applicant]/CRS misleading us.

[196] The respondent does not say who gave her the advice that expert and legal costs would be covered by EQC and Southern Response. Neither does she say whether or not her insurance policy provided for such costs to be recoverable. Nor does she say in what respect the advice she received "… turned out to be a fabrication". This is a serious allegation to make.

[197] In the absence of any such information, there is nothing to which the applicant could respond and I do not consider he was under any obligation to do so.

[198] The usual position under most material damage policies is that reasonable experts' fees incurred in a repair or rebuild process are covered by the insurer. The usual position regarding legal costs is that the successful party is entitled to recover costs from the unsuccessful party but the awarding and amount of such costs is ultimately at the discretion of the Court. In this instance, the Court had already determined that costs on a 2B basis would be payable.

[199] I have read all the available correspondence. In sending her comments on the draft statement of claim on 22 August 2016, the respondent asked:

> With regards to Appendix C of your Standard Terms of Engagement, 2.1 Fees: I was informed by Earthquake Services that your fees etc are obviously over and above other costs requested but are usually presented to either EQC or my insurer – is this the case?

[200] The applicant replied the following day:

> We will seek to recover costs and disbursements from EQC/Insurer, but there is no certainty that you get all of the costs/disbursements back.

[201] This exchange relates to legal costs only and the advice is brief to the point of being cursory but is consistent with the usual position. To the extent that the respondent might have interpreted the applicant's advice as being about independent experts' costs as well as legal costs, the exchange is not consistent with the respondent having any understanding from the applicant that all costs and disbursements were necessarily recoverable.

[202] The inference I draw is that any representation that might have been made about the recovery of costs was made by CRSL, not by the applicant.

[203] I have not seen the applicable policy. The statement of claim in the High Court proceedings includes a pleading that the insurer was expressly responsible under the policy for "architects' and surveyors' fees". There is no reference to engineering or other expert advisory costs. It was the respondent who failed to pursue her Court claim despite extensive accommodation of her personal circumstances by the Court.

[204] It is for the respondent to establish any aspect of her complaint on the balance of probabilities. I find that she has not done so and that there is no evidence to support any allegation of misleading conduct on the part of the applicant.

*(h) Is there any evidence of the applicant engaging in deceptive conduct?*

[205] This allegation appears to be linked with the respondent's generally unfavourable perception of CRSL's business model and her persistent assertions of inappropriate connections between the applicant and CRSL. I will discuss those issues later in this decision.

[206] The specific allegation, however, is that the applicant and CRSL had the same street address and that this was evidence of lack of "independence" and therefore "deception" about the relationship between the applicant and CRSL.

[207] I note that the Committee did not consider that this aspect of the complaint warranted mention in its decision. I agree that it has no merit.

[208] The applicant's letter of engagement is dated 18 August 2016. It clearly records both his Auckland and Christchurch office addresses. His Christchurch address remained the same throughout the period of the retainer.

[209] The respondent stated that "it is really rather strange that they shared an office if there was no connection". There was of course a "connection" between CRSL and the applicant. They had a referral relationship and must have had a close working relationship. CRSL recommended to their clients that the clients engage either the applicant or another named lawyer to act for them on their claims.

[210] This may well have been partly because the two lawyers were familiar with the nature of the work and the Earthquake List process and had relevant experience and expertise. In addition, the respondent herself observed to a CRSL representative, before engaging the applicant, that he had a reputation for being "aggressive" which, she wrote, "you kind of need".

[211] I have no doubt that the CRSL recommendation was also partly because the two recommended lawyers were willing to calculate their fees on a 2B basis. There is an implicit trade-off between low profit margin, volume of work and guarantee of payment. If so, there is nothing inherently wrong with that.

[212] The applicant has explained that he rented office space from CRSL. There is nothing wrong with that either. I find there is no evidence of the supposed deception the respondent complained about.

*(i) Did the applicant breach any professional duty in ceasing to act for the respondent?*

[213] I consider the email exchange between the respondent and the applicant of 16 February and 7 March 2018 to have been extremely unfortunate, particularly if, as seems likely, the two never had a conversation about the matter.

[214] It is abundantly clear from all the materials that the respondent's experiences with EQC and Southern Response and her living conditions while the dispute continued had had serious adverse consequences for her psychological wellbeing. She was anxious to resolve her claim. She was in straitened financial circumstances. There is no mention of family support. It seems she had also come to be suspicious and

mistrustful of virtually all other parties involved in the process of resolution, including those engaged to support her, being CRSL, its specialist advisers and the applicant.

[215] How she came to believe that "… by February [the claim] would be all wrapped up" is unexplained and probably inexplicable given that it had not yet been set down for hearing. She also appeared to believe that the applicant somehow had the power to "give an ultimatum" to the defendants about the case being set down for hearing. He had no such power.

[216] Regardless of that, the respondent's stated belief was inconsistent with the written explanation she had received at the outset from CRSL about the standard Earthquake List process and its likely timeframe (which was not less than two years) and she did not suggest that the applicant had given her any expectation that it would be any quicker than that.

[217] I interpret the email as the respondent simply "mouthing off" about her frustrations with the Court timetable. It is not at all unusual for clients in litigation processes to express similar frustrations, although not necessarily in the personally critical terms the respondent unfortunately used. By her last sentence, she was plainly seeking engagement and probably reassurance. Any experienced counsel would be completely familiar with the dynamic and adept at defusing it, if he or she chose to do so.

[218] There can be no argument, however, that the respondent had done exactly what the applicant wrote in his response. She had alleged that he had allowed delays to occur in the proceeding, been negligent and been "derelict in his duty" (which, in context, meant to expedite the proceedings). This was shortly after she had written to CRSL to say she had "lost faith in" it over what appears to have been the inconsequential cost of a second opinion over a quantity surveying matter but which probably relates back to the differing expert engineering opinions in August 2017. In her mind, the respondent associated the applicant with CRSL.

[219] The respondent's comments on 16 February 2018 were doubly unfortunate given that they were made three days before the applicant did successfully oppose the defendants' attempts to defer the case being set down for trial.

[220] The relationship between lawyer and client is necessarily one of trust and confidence. This goes both ways. The respondent had clearly expressed her process frustrations in terms of lack of trust and confidence in the applicant.

[221] I doubt that many counsel would have reacted in such a definitive way without making an attempt to resolve the perceived issue. In that regard, I consider that the applicant's counsel went a little far with her submission that the applicant "…had no professional choice but to terminate the retainer". The applicant himself put the matter more accurately. He said that "it would have been unwise" for him to continue to act. He added that '[t]rust had broken down. I had no wish to continue to act for [the respondent]".

[222] In my view, it cannot be said that it was not open to the applicant to treat the matter at face value – his client was saying he had been dilatory, negligent and derelict in his duty. He was entitled to form his own view that trust and confidence had broken down. He was therefore justified in terminating the retainer.

[223] I agree with the Committee that, in those circumstances, the applicant fulfilled his professional conduct obligations under r 4.2(c) of the Rules in that:

(a) he had good cause to terminate the retainer, as the relationship of trust and confidence had broken down;

(b) he gave reasonable notice, as the next timetabled step in the Court proceedings was apparently over two months away;

(c) he specified the grounds for termination, which was straightforward as he was simply quoting the respondent's allegations against him.

[224] In relation to the reasonable notice aspect, I rely on the Committee's finding to that effect. The applicant stated that the next scheduled Court date was on 14 May 2018. The respondent's counsel appeared to say otherwise in correspondence, stating that a Court teleconference was due "shortly".

[225] It seems they were both correct. The 19 February 2018 Court minute directed that a Court teleconference be convened "as soon as possible after 16 March 2018 at which conference it is expected that the matter will be set down for trial" but this was premised on the defendants meeting a 9 March deadline for filing additional evidence and the respondent responding to that evidence by 16 March 2018. The defendants were four days late in filing their additional evidence.

[226] In my view, it was incumbent on the applicant, if terminating the retainer, to do so in such a way as to give the respondent sufficient time to engage a new lawyer before the next scheduled Court date. It seems that he did so although, ideally, the email

terminating the retainer should have been sent more promptly after receipt of the respondent's 16 February email.

[227] The applicant also prepared for her the necessary Court form to file to notify the Court of a change of lawyer. The respondent told him expressly that she did not require his assistance in finding new representation.

[228] The respondent has complained variously of the applicant "ceas[ing] to act for me out of the blue", "ceas[ing] to act abruptly and without warning", "leaving me in the lurch", "ceas[ing] to act without giving me enough time or an opportunity to take other advice" which was "an absolute bombshell and came out of the blue" and that she was "left high and dry" and that the applicant "[broke] the "Contract/Agreement by ceasing to act".

[229] I accept absolutely this is the way the respondent felt. Even allowing for the context I have commented on in paragraph [214], these assertions nevertheless blithely ignore the implications of her accusation that the applicant had been dilatory, negligent and derelict in his duty. These are not allegations one can make against one's lawyer and expect the lawyer to ignore them.

[230] So far as the immediate Court timetable was concerned, it would certainly have been "unwise", given the negligence allegation, for the applicant to have sought to advise the respondent on her response to the defendant's additional evidence during the week between its receipt and the Court granting leave to withdraw.

[231] The other observation I make is that the applicant would have been fully aware of CRSL's interest in and obligation to seek to arrange alternative legal representation for the respondent and therefore that that potential issue was CRSL's to resolve in the circumstance of the respondent declining any assistance from the applicant, as she did.

*(j) Did the applicant fail to advise the respondent to seek independent advice in breach of r 5.11?*

[232] Rule 5.11 provides as follows:

> When a lawyer becomes aware that a client has or may have a claim against him or her, the lawyer must immediately-
>
> (a) advise the client to seek independent advice;
>
> (b) inform the client the he or she may no longer act unless the client, after receiving independent advice, gives informed consent.

[233] The Committee considered that this rule was engaged on the applicant's receipt of the respondent's email of 16 February 2018. I disagree. Saying something is so does not make it so. In this context, the respondent's assertions that the applicant had allowed delays to occur in the proceeding, been negligent and been "derelict in his duty" did not mean that the applicant was deemed to have become aware that she had or might have "a claim" against him.

[234] Rule 5.11 applies where a lawyer becomes aware that, either objectively or subjectively on the basis of the lawyer's own knowledge and judgment, he or she might have committed an actionable act or omission. It requires the lawyer to alert the client to the fact that the client might have such a claim and to step aside so that the matter can be explored with the client having the benefit of independent legal advice. It is focused on a circumstance that the client might not otherwise be aware of because of lack of knowledge of the relevant facts or law including the possible implications of the lawyer's perceived error. It is an aspect of the fiduciary duty of loyalty.

[235] The relevant allegation here was one of negligence. The respondent did not say in what respect she considered him to have been negligent. There is nothing in the complaint materials to suggest that he had been negligent. The Committee had the benefit of reviewing the applicant's file and made no adverse comment about his conduct of the proceedings for the respondent. There is no evidence to suggest that he should have been "aware" that the respondent might have a claim in negligence against him.

[236] Beyond that, there is an issue as to whether r 5.11 could be considered to extend to awareness of a possible claim of breach of a professional conduct duty rather than a duty owed under the civil law. In my view, the reference to "claim" implies an actionable claim of breach of a legal duty sounding in, for example, breach of contract, negligence or breach of fiduciary duty.

[237] As a matter of principle, it makes no sense to suggest that a lawyer has an obligation to advise a client to get independent legal advice about possibly making a professional conduct complaint against the lawyer. The lawyer's relevant regulatory obligation is only to advise the client how to make a complaint, as part of the principal aspects of client service as required by r 3.4(d) of the Rules.

[238] In any event, there is nothing in this instance to suggest that the applicant was or objectively should have been aware at the time of termination of the retainer that the respondent had grounds to make a professional conduct complaint against him. Her complaint that he should have given the recalcitrant defendants an ultimatum about the

case being set down for hearing is no more than an expression of misunderstanding on her part of the Court's control of its process.

[239] I find there was no breach of r 5.11 of the Rules.

*(k) Is there any evidence that the applicant failed to achieve an outcome of the respondent's claim?*

[240] A lawyer is not responsible for the workings of the Court process. It is the Judge who is in control of that process. Nor is a lawyer responsible for the conduct of the opposing parties or, for that matter, any dilatory behaviour on the part of his own client.

[241] At the time the respondent made her criticisms of the applicant and the applicant terminated the retainer, the process of compilation of the evidence required by the Court had not been completed and the case had not been set down for hearing. The applicant had no ongoing involvement in the proceedings.

[242] According to the subsequent correspondence from the respondent's replacement counsel, Southern Response was continuing to deny liability altogether two and a half years later.

[243] The respondent's Court claim was ultimately "unsuccessful", in the sense that it was transferred to the CEIT by Court order after the respondent had failed four times to comply with timetabling orders. This was despite the respondent being given a six-month reprieve expressly because of the stress she was under.

[244] I find there is no merit in this aspect of the complaint. In making that finding, I record that it should not be interpreted as a finding about any arguable lack of diligence on the applicant's part during 2017. The respondent's email of 16 February 2018 seems to be in substance a complaint to the applicant that he had not been diligent enough in attempting to counteract what the respondent perceived to be delaying tactics by the defendants. This was not an element of her complaint to the NZLS, however.

*(l) Did the applicant have a "conflict of interest" when acting for the respondent?*

[245] I have expressed this issue in this generic way to encompass:

(a) the respondent's allegation that there was a "joint venture" between her, CRSL and the applicant leading to the applicant having a conflict of duty;

(b) the Committee's findings that the applicant breached rr 5.4, 5.4.1 and 6 of the Rules.

The respondent's joint venture argument

[246] The respondent advanced no argument in support of her assertion that there was a joint venture other than to state that "[m]y legal aid lawyer ascertained that the contract was a joint venture between myself, CRS and [the applicant], therefore as he was my legal representative, I trusted what he said to be legally correct". I accept the respondent's evidence that she received that advice.

[247] Again, saying something is so does not make it so. The applicant was not a party to the LCM Agreement. CRSL was not a party to the applicant's retainer, although it had contractual rights to disclosure of client information. In my view and without traversing the law on joint ventures, there is nothing in the combination of the LCM Agreement and the applicant's letter of engagement and appendices, or in the manner in which the claim was then pursued, that is indicative of any arrangement that could sensibly be described as a "joint venture".

[248] The substance of the arrangements was that the respondent engaged CRSL to provide technical and financial support for the pursuit of her claim, CRSL recommended to the respondent that she instruct either the applicant or the other recommended lawyer, the respondent decided who she wished to engage, CRSL briefed the applicant on the respondent's behalf, the applicant and respondent entered into a retainer for legal services, the applicant thereafter pursued the claim on the respondent's instructions and CRSL both funded the entire process and took the risk on an adverse outcome.

[249] All financial and commercial risk was on CRSL. This is fundamentally inconsistent with a "joint venture".

[250] The LCM Agreement did contain a mechanism for resolving a difference of opinion between the respondent and CRSL about whether any settlement offer that might be received should be accepted but that was a matter between them that did not involve the applicant and the mechanism is again not indicative of a joint venture.

[251] I find on the information directly available to me that the respondent's assertion of a "joint venture" is not made out and consequently the allegation of conflict of duty for that specific reason has no merit.

[252] Having come to that view on the information directly available to me, I record that I have also read the High Court and Court of Appeal decisions in the *Pfisterer* litigation.

[253] The applicant says that the arrangements relating to Mrs Pfisterer's claim were "identical". This cannot be correct in respect of client-CRSL leg of those arrangements. The Court of Appeal judgment records that the agreement between Mrs Pfisterer and CRSL was "straightforward" and "just two pages long".[12] The LCM Agreement could perhaps be described as conceptually straightforward ("No Win, No Pay" is a fair summary) but it is not a straightforward document from a layperson's perspective; it is 19 pages long including 3 pages just of definitions.

[254] One of the potentially material differences is that the Court of Appeal found that the Pfisterer agreement did not give rise to a relationship of principal and agent between Mrs Pfisterer and CRSL, as CRSL was "… contractually required to seek instructions from Mrs Pfisterer before engaging any third party".[13] There is no such provision in the LCM Agreement. The LCM Agreement refers to "… consultants engaged by CRS" and expressly appoints CRS '… to undertake the Project and to act on the Client's behalf in relation to the Client's potential Claim as set out in this Agreement".

[255] I accept, however, that the arrangements of relevance to the applicant were probably identical from his perspective. CRSL referred the prospective client to him. The client engaged him. He undertook the legal work. CRSL paid for it.

[256] For the immediate purpose of discussing the "joint venture" assertion, the pertinent point is that Mrs Pfisterer apparently pleaded the existence of a "joint venture" but this aspect of her claim was abandoned at hearing without argument and was in any event expressly rejected by the Court.[14]

[257] I consider that my decision on this aspect of the complaint is consistent with the two *Pfisterer* decisions, to the extent that they are relevant to it.

<u>The Committee's findings of breach of rr 5.4, 5.4.1 and 6 of the Rules</u>

[258] In its decision, which preceded the Court of Appeal decision affirming all relevant findings made by the High Court in the *Pfisterer* matter, the Committee was not attracted by the High Court's extensive discussion of arguably parallel legal principles. I quote the relevant paragraph of its decision below:

> 58. The Committee also considered the decision of *Pfisterer*. It concluded that it was distinguishable on its facts and therefore not relevant to its current consideration. That decision considered whether [the applicant's] firm had breached fiduciary duties owed to a client rather than whether there had been compliance with the [Rules]. The Judge noted, for example, at [148] that certain conduct of [the Applicant]'s firm may have been a breach of duty but was not a

[12] *Pfisterer v Claims Resolution Service Ltd*, above n 4, at [98].
[13] At [71].
[14] *Claims Resolution Service Ltd v Pfisterer*, above n 3, at [121] and [127]–[129].

> breach of fiduciary duty, which was the issue before the court. There also appears to have been no issue in that case of the client being invoiced by [the applicant's] firm inconsistently with the terms of engagement with the client as a consequence of a different arrangement between [the applicant's] firm and CRS, which is the essence of this aspect of [the respondent's] complaint.

[259] I accept that a decision of the High Court on the application of the legal principles relating to fiduciary duty to a very similar tripartite relationship on substantially similar facts was not binding on the Committee in relation to regulatory duties. The jurisdictions are different. The Committee's findings that the High Court decision was "distinguishable on its facts" and "therefore not relevant" are nevertheless rather bold.

[260] An initial difficulty is that the Committee did not explain in what way it considered the factual circumstances in *Pfisterer* to be distinguishable from the factual circumstances of the present complaint. On my reading of all the complaint materials and the two Court decisions, the only two arguably material factual circumstances that are different are that:

(a) as I have already noted, the form of Mrs Pfisterer's contract with CRSL must have been different from the form of the respondent's contract with CRSL;

(b) Mrs Pfisterer's evidence that she was not told by the CRSL personnel that the lawyer would charge on a 2B basis was expressly rejected by the Court in favour of evidence to the contrary from the CRSL staff member who explained the terms of the CRSL contract to her.

[261] As an aside in relation to the present complaint, there is no evidence as to what was or was not explained to the respondent by the CRSL personnel before she entered into the LCM agreement as to the basis on which legal fees would be charged by whichever lawyer was in due course engaged. I can make no assumption about that one way or the other which is why my finding is only that it is "more likely than not" that it was not so explained. The respondent had of course not selected a lawyer at that stage. The matter is not relevant to this review, as it is the lawyer's obligation to explain the basis on which fees will be charged.

[262] I do not quite follow the Committee's reasoning in the last sentence of paragraph [58] of its decision noted above, assuming this was intended to be an explanation of a factual circumstance that was sufficiently different to distinguish the complaint circumstances from the *Pfisterer* circumstances. There is no suggestion in the *Pfisterer* decision that the charging of legal fees on a 2B basis was a term of the CRSL contract and it could hardly have been so, as it was open to the client to engage a lawyer other than the lawyers recommended by CRSL and one who did not charge on a 2B basis.

[263] Nor is it the case in the present complaint that there was a "different arrangement" between the applicant and CRSL from the arrangement between the applicant and the respondent as to the charging of fees. As discussed earlier in this decision, there was no arrangement between the applicant and the respondent as to the charging of fees and the applicant thereby breached r 3.4(a) of the Rules.

[264] In summary, I identify no material, distinguishing factual feature between the *Pfisterer* circumstances as they are explained in the High Court decision and the circumstances of the present complaint. This is by the by because, as the Committee correctly stated, Mrs Pfisterer's claims in this respect were ones of breach of fiduciary duty (against both CRSL and the lawyer) whereas the Committee's task, and my task on review, is to determine whether the applicant has breached any professional duty to the respondent arising under the Act or the Rules.

[265] The crux of the Committee's decision was that the applicant breached each of rr 5.4, 5.4.1 and 6 of the Rules. For the reasons set out below, I come to a different view on each of those matters.

Rule 5.4

[266] The Committee's briefly stated conclusion was that:

> … given [the applicant's] agreement with CRS, he found himself in a situation where there was either an actual conflict, or at the very least a risk of conflict, between his interests (*in terms of discharging his obligations to CRS*) and his duty to protect the interests of [the respondent] as his client. Therefore, it concluded that by acting in such circumstances, [the applicant] had breached Rule 5.4 of the [Rules].

[267] The immediate problem with this conclusion is that Committee did not articulate what obligations to CRSL it considered the applicant to have had that gave rise to a conflict or risk of conflict between those obligations and his obligations to the respondent.

[268] Before proceeding to discuss this aspect of the complaint, I record that I fully understand that the Committee might have had difficulty in determining what obligations the applicant had to CRSL. I have had the same difficulty. In that regard, I consider that the applicant's responses to direct questions to have been self-contradictory, deflective and perhaps intentionally obtuse. I make that observation after having put my concerns directly to the applicant in writing with a request for clarification and the applicant electing not to respond, other than with a comment about something I had not asked him about.

[269] The Committee requested the production of the agreement between the applicant and CRSL (among other documents) on two occasions. The first occasion, in

May 2022, was expressed as a request. In reply, counsel for the applicant recorded in July 2022 that her instructions from the applicant were that:

> 1. Due to the passage of time, he is unable to locate a copy of a written contract with CRS".
>
> 2. The contract he had with CRS at the time of the [respondent's] instruction was the same contract he had at the time of the Pfisterer instruction.
>
> 3. In *Pfisterer* evidence of that contract was given orally – no written document was discovered.

[270] On the second occasion, in October 2022, the Committee ordered production of the agreement pursuant to s 147 of the Act. The response from counsel was to quote her first response and to state that "nothing has changed" and that the applicant was unable to produce the document.

[271] In November 2022, the Committee made a request for a copy of the document from the GCCRS purportedly under s 188(2) of the Act. That is not a provision empowering a standards committee to require anyone to produce documents but there is nothing to prevent a committee making such a request, although it is unclear why the Committee thought the GCCRS would have had a copy. In any event, the request apparently did not elicit a response. In December 2022, it made a similar request to CRSL which also did not elicit a response.

[272] In February 2023, it resolved to issue an order under s 147 against CRSL to produce a copy of the agreement on the basis that CRSL was a "related entity" of the applicant for the purposes of s 147(1)(b) and s 6 of the Act. This did not appear to result in any communication to CRSL, however. I presume this was because the Committee realized that CRSL was not in fact a related entity of the applicant in terms of the Act and that it therefore had no power to make such an order.

[273] I record the above matters because it is clear to me that the Committee demonstrated patience and diligence in making every reasonable attempt to ascertain the terms of the applicant's agreement with CRSL from primary records. No such records have ever been produced.

[274] The applicant referred to the evidence given at the *Pfisterer* High Court hearing about his arrangements with CRSL. He provided me with a copy of the transcript. My assessment, which I communicated to the applicant by minute, was that he himself had not given any evidence about the nature of his agreement(s) with CRSL other than in relation to the fee payment obligation and that my interest was in what he had to say about the agreement(s), not about what CRSL employees had to say about them.

[275] The primary comment in the *Pfisterer* High Court decision about the form and terms of that agreement was that:[15]

> [The firm] and CRSL had an informal agreement that [the firm] would not bill their file until conclusion with the effect that generally their fees would be deducted from monies recovered from the insurer. Although there was no agreement to this effect, [the firm] would sometimes also carry disbursements incurred by them, through to settlement.

[276] In its decision, the Court of Appeal simply noted that "the Judge found that [the firm] had an informal agreement with CRS that it would not invoice its fees until the matter was resolved."[16]

[277] The applicant also stated that "the agreement between me and CRS is/was that I charge it on a 2B basis. It is liable to pay me whatever the outcome of the underlying claim". However, he also stated in response to my minute variously that:

(a) "The Pfisterer agreement is dated 28 February 2014";

(b) "The [respondent's] agreement with CRS is dated 2016";

(c) "There was a single document that covered [the respondent's] and other claims".

[278] By further minute, I made the following observations:

(a) All of the applicant's statements about his arrangement with CRSL could not be true at the same time and his more recent statements were inconsistent with the findings of fact made by the High Court in the *Pfisterer* matter.

(b) I was not bound by the Court's findings of fact in that matter, particularly if the applicant himself now contradicted them.

(c) An agreement that cannot "be located … owing to the passage of time" can only have been a formal agreement.

(d) If there was a formal agreement that the applicant had said he could not locate, it seemed problematic for him then to say that it was dated 28 February 2014.

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[15] At [10].
[16] *Pfisterer v Claims Resolution Service Ltd*, above n 4, at [7].

(e) An "informal" agreement could not bear a date, unless the applicant had an understanding of "informal" that differed from the High Court's, the Court of Appeal's and mine.

(f) If there was a "single document that covered [the respondent's] and other claims", it could not have been an informal agreement.

(g) If the Pfisterer agreement was "dated 28 February 2014" and [the respondent's] agreement was "dated 2016" (the date not being specified), it could not have been a "single document", unless the applicant meant to say that the *Pfisterer* matter was not one of the "other claims" covered by [the respondent's] agreement.

(h) If there was "a single document" and this was "more than 10 years [ago]", the single document covering [the respondent's] and other claims could not have been "dated 2016".

(i) If the Pfisterer agreement was "dated 28 February 2014" and [the respondent's] agreement was "dated 2016", they could not have been "the same contract".

(j) Most importantly, if the Pfisterer and [the respondent's] agreements were not "the same contract", the evidence and Court findings in relation to the *Pfisterer* matter were not necessarily helpful to me in relation to this review.

[279] The applicant's response was that his references to the two documents dated 2014 and 2016 were "…. written agreements between CRS and either Pfisterer or [the respondent]. Not me." I had not asked him about agreements between CRSL and its clients, hence my comment about that particular response being "perhaps intentionally obtuse". I would make the same comment about the implicit suggestion that the terms of LCM Agreement were the terms of his agreement with CRSL.

[280] As I have already observed based on the Court of Appeal's description of the contract between CRSL and Mrs Pfisterer, that contract could not have been in the same form as its contract with the respondent. There are also references in the *Pfisterer* High Court decision to contract terms that do not appear in CRSL's contract with the respondent (for example, a cancellation fee) and, unlike the respondent's agreement, the Pfisterer agreement apparently did not have a mechanism enabling CRSL to have any influence over the acceptance of a settlement offer. None of this is relevant to the terms of the applicant's agreement with CRSL, however.

[281] Against that background, the only findings the Committee made about the terms of the agreement between the applicant and CRSL were that the applicant "… would invoice CRS for his fees at the conclusion of his engagement" and that "… [the] arrangement enabled [the applicant] to invoice and receive payment regardless of his work whether or not the claim was successful". It was also a term of the agreement that the applicant would charge CRSL on a 2B basis.

[282] I consider it self-evident that the first finding did not give rise to any risk of conflict with the applicant's obligations to the respondent. His only relevant obligation was not to charge fees to her, at any time.

[283] I also struggle to identify any way in which the second finding could arguably give rise to any risk of conflict with the applicant's obligations to the respondent. It cannot be suggested that the applicant had any obligation to the respondent not to charge CRSL if the respondent's claim was unsuccessful.

[284] The commercial risk associated with an unsuccessful claim was entirely on CRSL. It was clear from the LCM Agreement that CRSL would pay the relevant legal fees regardless. The respondent had no interest in the matter, provided she was not asked to pay anything.

[285] It is the third identified term of the agreement, of fees being charged to CRSL on a 2B basis, that has generated an inordinate amount of attention, analysis and argument. Again, I struggle to identify any way in which this aspect of the applicant's arrangements with CRSL could arguably give rise to any risk of conflict with the applicant's obligations to the respondent.

[286] The applicant's relevant obligation to CRSL was, in effect, to charge a set fee calculated by reference to a formula set out in the High Court Rules, regardless of the complexity of the proceeding, the time and labour expended, the approach taken by the defendants, any difficulties encountered, the rate of progress and the ultimate outcome.

[287] The applicant's relevant obligation to the respondent (as a person ultimately but conditionally "chargeable with" the bill of costs) was, as explained earlier, not to charge a fee that was more than fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in r 9.1 of the Rules.

[288] I have set out my view on those matters earlier in this decision, including that this was a "bargain basement" fee calculation mechanism and one in which the

respondent had no risk in terms of outcome, and that all commercial risk was borne by CRSL.

[289] I would go so far as to say that this was an astoundingly good deal for the respondent in terms of the cost to her of the legal process had she persevered with it, the kicker of course being her liability to CRSL for an effective 23% commission should her claim have been successful. The commission to CRSL was not part of the legal fee, however. It was a payment liability to CRSL for the cost and risk of assisting her to pursue the claim.

[290] If the respondent had persevered with the Court process and been successful, there would have been no net cost to her of the legal process because she would in the normal course of events have been awarded 2B costs by the Court. The whole arrangement was structured to be cost-neutral to CRSL's client, apart from the commission which was of course significant. (By comparison, the commission rate in the Pfisterer matter was 8% plus GST (effectively 9.2%) but Mrs Pfisterer was responsible for some of the legal process costs).

[291] The respondent did not persevere with the Court process. She could have done so with a replacement lawyer of her choice for no additional cost. She can complain about the applicant's termination of the retainer but she cannot blame the applicant (or CRSL) for her decision, or indecision, regarding ongoing pursuit of the High Court claim.

[292] For the purposes of this aspect of the complaint, my finding is that there was no actual conflict and no arguable risk of conflict between the applicant's obligations to CRSL and his obligations to the respondent. Accordingly, there was no breach of r 5.4 of the Rules.

[293] The other observation I make is that although the jurisdictions are different and the professional duty as expressed in r 5.4 is a regulatory one, the principles underlying r 5.4 are very much premised on a lawyer's fiduciary duties at law that were the subject of the *Pfisterer* Court decisions.

[294] In the High Court, Mrs Pfisterer's lawyers were found to have breached their fiduciary duty of loyalty and good faith solely by reason of continuing to negotiate terms of settlement and filing a memorandum in Court that disclosed confidential client information after their retainer had been terminated. Those circumstances do not apply in the present complaint (and, in that respect, the *Pfisterer* case is indeed distinguishable on the facts).

[295] On the question of whether there was a conflict or risk of conflict between the obligations owed by the lawyer to the client and those owed to CRSL, which was expressed as a question of "divided loyalties", I consider the material facts in the *Pfisterer* case to be identical to those of the present complaint.

[296] The High Court held that there was no "business relationship" between the lawyer and CRSL such as to give rise to a conflict of interest[17] and that it was not a case of the lawyer having "divided loyalties".[18] Her Honour also held specifically that the billing matters agreed between the lawyer and CRSL were not contrary to Mrs Pfisterer's interests. These findings were affirmed on appeal.

Rule 5.4.1

[297] The Committee's next finding was that the applicant breached r 5.4.1 of the Rules, which provides as follows:

> Where a lawyer has an interest that touches on the subject matter in respect of which regulated services are required, the existence of that interest must be disclosed to the client or prospective client irrespective of whether a conflict exists.

[298] This is another rule that is squarely based on underlying fiduciary duty principles; in this instance, the duty of loyalty.

[299] The Committee's rationale was again succinctly expressed:

> As concerns the application of Rule 5.4.1, the Committee was satisfied that it could fairly be said that, by virtue of the agreement with CRS, [the applicant] had an interest which touched on the matter in respect of which he was acting for [the respondent]. [The applicant] was in a position where he stood to gain a personal advantage from his agreement with CRS (*noting that the agreement may have affected the calculation of fees owed by her*). He was therefore required to disclose the existence of that interest to [the respondent] irrespective of whether an actual conflict existed.

[300] I differ from the Committee on this issue also. The applicant's interest touching on the matter in respect of which the respondent had instructed him was to be paid. His agreement with CRSL provided for him to be paid. Expressed in terms of "personal advantage", simply being paid for the legal work one does is not part of any mischief that r 5.4.1 is designed to prevent. If the Committee's view was correct, r 5.4.1 would be breached every time a third party agreed to pay a client's fees; parents for their children, for example.

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[17] *Claims Resolution Service Ltd v Pfisterer*, above n 3, at [127]-[130].
[18] At [134]–[141].

[301] It cannot be suggested that the respondent was unaware of the existence of the agreement or that the applicant had not disclosed its existence. The LCM Agreement obliged CRSL to pay the legal fees. The obvious implication was that CRSL had or would have an agreement with whichever lawyer the respondent in due course engaged for the lawyer to charge CRSL and not the client. The applicant's engagement documentation stated expressly in two places that fees would be paid in accordance with the respondent's agreement with CRSL.

[302] In my view, the application of r 5.4.1 is that simple. I find that there was no breach of r 5.4.1.

[303] The issues arising from nondisclosure by the applicant of his agreement to charge CRSL on a 2B basis relate to the application of rr 3.4(a) and 9 of the Rules, as discussed earlier in this decision.

[304] For completeness, there is nothing in the *Pfisterer* High Court decision to indicate that Hinton J had r 5.4.1 (or r 5.4) in mind with her passing reference at paragraph [148] to the possibility of a breach of duty that was not a breach of fiduciary duty. The earlier reference in paragraph [144] to the charging of costs on a 2B basis is to the firm not providing the full information required by the Rules. Her Honour's relevant finding was that there was no conflict of interest in that regard and no breach of fiduciary duty.

Rule 6

[305] Finally on the core issue of alleged conflict of interest or duty, the Committee found that the applicant failed to discharge his obligation to the respondent under r 6 of the Rules, which provides that:

> In acting for a client, a lawyer must, within the bounds of the law and these rules, protect and promote the interests of the client to the exclusion of the interests of third parties.

[306] In the Committee's view, the "third parties" in question were CRSL and the applicant himself. It stated that "[i]t was simply not possible for [the applicant] to discharge his duty to the respondent under Rule 6 given the existence of competing interests (*being his own interests and those of CRS*)".

[307] The immediate and obvious difficulty is that the Committee does not identify in what respect the applicant was seeking to protect and promote the interests of the CRSL during the course of his retainer from the respondent. There is no evidence that the

applicant acted for CRSL in any respect, let alone any respect that might be argued to conflict with his protection and promotion of the respondent's interests.

[308] There is no evidence that CRSL had any involvement in the instruction process relating to the respondent's High Court claim once the respondent had satisfied herself about and approved the applicant's terms of engagement and the draft statement of claim.

[309] The sole obligations of the applicant to CRSL of which there is any evidence and about which any finding was made by the Committee were his obligation to charge it on a 2B basis for his firm's legal work for the respondent and his obligation not to charge the respondent. For the reasons discussed earlier, the performance of these obligations cannot reasonably be argued to constitute anything other than protecting and promoting the respondent's interests.

[310] I acknowledge that a flexible approach to interpretation of the wording of provisions of the Rules is often necessary to accommodate circumstances not expressly contemplated by the drafters of the legislation. To describe the applicant himself as a "third party" for the purposes of r 6 is nevertheless a step too far. He is the first party owing obligations to his client, the second party.

[311] Even if he were a "third party" in a different capacity, there is no evidence that he had any interest that he was seeking to protect and promote in competition with the respondent's interests. An interest in being paid for his work by a third party, CRSL, is not a competing interest, particularly where the respondent had no obligation to pay him anything under any circumstances.

[312] On both counts, the Committee's finding of breach of r 6 is misconceived, in my view. I find there was no such breach.

[313] To the extent that the broadly similar factual circumstances in the *Pfisterer* matter and the consequent comments and findings in the High Court decision might be argued to be indirectly relevant, I note that the Court held that:

(a) it was not contended that CRSL was a client of Mrs Pfisterer's lawyer;

(b) the argument based on there being a "joint venture" was abandoned and was in any event rejected;

(c) it was held that the referral relationship and close working relationship between CRSL and the lawyer did not amount to a "business relationship" that created any conflict of interest;

(d) it was held that the lawyer retaining or having the prospect of bulk referral of work did not amount to a personal interest or prospective personal advantage;

(e) it was held that all three parties had a common interest in securing a "win" on the claim and there was no inherent conflict of interest in that regard.

[314] None of these findings was successfully challenged on appeal.

[315] I acknowledge that the Committee considered the *Pfisterer* decision to be "distinguishable on the facts" but it is difficult to discern a material factual difference and, as I have noted, the relevant rules cited by the Committee are very much a regulatory expression of the same fiduciary duty principles.

[316] It would therefore be odd to arrive at a materially different outcome in a complaint process, although this is certainly possible with other provisions of the Rules (not relevant here) relating to conflict of duty which impose more rigorous obligations on lawyers than is the case under the common law (notably rr 6.1 to 6.3).

*(m) Is there any evidence that the applicant "put the law (or the legal profession) into disrepute" by reason of his "involvement" with CRSL?*

[317] Rule 10.2 of the Rules provides that "a lawyer must not engage in conduct that tends to bring the profession into disrepute". Aside from the "joint venture" and related conflict-of-interest allegations that I have already discussed, this element of the respondent's complaint is bound up with her stated opinions about CRSL.

[318] The respondent's numerous allegations about CRSL included engaging unqualified engineers, misrepresenting the extent of earthquake repairs, conflict-of-interest, providing "woefully inadequate" service and being incommunicative, engaging in misleading and deceptive conduct, breaching consumer guarantees, charging excessive interest and being "unscrupulous" and a "very dodgy organisation".

[319] It is not my function to comment on those allegations, as they were made against CRSL. CRSL is not a law firm. The applicant is not CRSL. He is a lawyer who was engaged to do legal work for the respondent on CRSL's recommendation. On the

materials available to me, there is no basis for him to be tarred with any brush the respondent wishes to flick at CRSL.

[320] The sole allegation against CRSL that could reasonably be argued to implicate the applicant was the generic conflict-of-interest allegation. For the reasons set out in this decision, my conclusion is that there is no substance in that allegation. Consequently, my finding is that the applicant has not breached r 10.2 of the Rules by reason of his representation of the applicant or by reason of his referral relationship and working relationship with CRSL.

*(n) Are there grounds and good reason for a finding of unprofessional conduct to be made?*

[321] This allegation appears to be a different way of expressing the respondent's more specific allegations relating to the alleged joint venture, resulting conflict of interest, failure to disclose the fee calculation arrangement and termination of the retainer without good cause. If any of those allegations was made out, a finding could also be made of failing to maintain professional standards in breach of r 10 of the Rules and consequent unsatisfactory conduct under s 12(c) of the Act or of unprofessional conduct and consequently unsatisfactory conduct under s 12(b) of the Act.

[322] Rule 10 is something of a "catch-all" provision that is normally engaged either where the lawyer has been held to have breached a raft of other Rules or where there is repetitive behaviour or where conduct is unprofessional but does not squarely "fit" in a more specific provision of the Rules. This reflects the fact that the Rules are not an exhaustive expression of a lawyer's ethical obligations. Similarly, conduct can be found simply to be "unprofessional" under s 12(b) of the Act without any provision of the Rules having been breached.

[323] The Committee determined unsatisfactory conduct on the part of the respondent by reason of breach of rr 5.4, 5.4.1, 5.11 and 6 of the Rules. It did not consider it necessary also to make a finding of breach of r 10 or of unprofessional conduct under s 12(b) of the Act. I have found no breach of any of those rules but have found unsatisfactory conduct on the part of the respondent by reason of breach of rr 3.4(a) and 13.4 of the Rules. I do not consider it necessary in the fulfilment of the purposes of the Act to make any additional finding of breach of r 10 or of unprofessional conduct under s 12(b).

*(o) Were the penalties imposed by the Committee excessive, disproportionate to the conduct in issue, inconsistent with previous decisions, or premised on misstatement of the applicant's disciplinary history?*

[324] As I intend to reverse the Committee's determination regarding breach of rr 5.4, 5.4.1, 5.11 and 6 of the Rules, it is unnecessary to address this question.

*(p) Did the Committee err procedurally by failing to hear and consider submissions on the issue of penalty after first making conduct findings.*

[325] For the same reason, it is unnecessary to address this question. One of the applicant's concerns was that Committee mis-stated his disciplinary history, which appeared to be extensive in the sense that he has been the subject of an appreciable number of decisions of the LCRO and of the Disciplinary Tribunal. I did not read those decisions before making my professional conduct findings, so as not to be influenced by them in determining this review.

[326] After a standards committee makes a disciplinary finding against a lawyer, it then has access to previous disciplinary decisions about that lawyer including at standards committee level so that it can take the lawyer's disciplinary history into account in deciding on an appropriate penalty. This office does not automatically have access to a lawyer's disciplinary history at standards committee level.

[327] I invited the applicant to provide me with a copy of any standards committee decisions in which a professional conduct finding against him had been made, regardless of whether an unsatisfactory conduct finding was also made. I made no direction in that regard. The applicant did not respond. The applicant having raised the issue, I therefore obtained copies of the decisions from the Lawyers Complaints Service and will read them in due course.

[328] In the context of the raft of allegations made against the applicant in the complaint, the sole professional conduct findings I have made against him are relatively minor. I propose to provide the applicant with an opportunity to make submissions on penalty, including as to the relevance of his previous disciplinary history. I do so as a courtesy to him and not as any implied suggestion that it is procedurally necessary to do so or that the Committee's process in that respect was in any way deficient. The respondent may also wish to make submissions.

**Decision**

[329] Pursuant to s 211(1)(a) of the Act, the determination of the standards committee dated 29 September 2023 is reversed in its entirety.

[330] Pursuant to s 211(1)(a) of the Act, the decision of the standards committee dated 13 November 2023 to order publication of a summary of its decision including, subject to NZLS Board approval, the name of the applicant is reversed.

[331] Pursuant to s 211(1)(b) of the Act, I find that the applicant has engaged in unsatisfactory conduct by reason of breach of rr 3.4(a) and 13.4 of the Rules.

[332] If either party wishes to make submissions regarding any disciplinary orders to be made, he or she is to do so in writing within 10 working days of the date of this decision. Submissions should be brief.

**Publication**

[333] Section 206(1) of the Act requires that every review must be conducted in private. Section 213(1) of the Act requires a Review Officer to report the outcome of the review, with reasons for any orders made, to each of the persons listed at the foot of this decision.

[334] Pursuant to s 206(4) of the Act, a Review Officer may direct such publication of his or her decision as the Review Officer considers necessary or desirable in the public interest. "Public interest" engages issues such as consumer protection, public confidence in legal services and the interests and privacy of individuals.

[335] Having had regard to the issues raised by this review, I have concluded that it is desirable in the public interest that this decision be published in a form that, subject to the following two paragraphs, does not identify the parties or others involved in the matter and otherwise in accordance with the LCRO Publication Guidelines.

[336] By reason of the references to the reported decisions in the *Pfisterer* litigation, which are necessary because of the applicant's reliance on them, it is not possible to anonymise references to EQC, Southern Response, CRSL, the GCCRS or the CEIT.

[337] Given that the identity of the applicant will be obvious to anyone with sufficient interest to read the reported decisions in the *Pfisterer* litigation and given the findings I

have made, it is open to the applicant to request that his name be published in the otherwise anonymised version of this decision. Leave is reserved accordingly.

[338] Paragraphs [335] and [337] will apply to the subsequent penalty decision.

**DATED** this 2ND day of April 2024

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**FR Goldsmith**
**Legal Complaints Review Officer**

Copies of this minute are to be provided to:

Mr HV as the Applicant
Ms BQ as the Respondent
[Area] Standards Committee [X]
New Zealand Law Society