LCRO 205/2015

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**R and N FAMILY TRUST** Applicants
AND	**EL** Respondent

DECISION

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

Introduction

[1] The trustees of the R & N Family Trust have applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of their complaint concerning the conduct of the respondent, Mrs EL.

Background

[2] OE, TE and UL are the trustees of a family trust known as the R & N Family Trust (the Trust).

[3] The trust owned a section in [Suburb A]. In 2012, a decision was made by the trustees to build a residential home on the section. To achieve this goal the trustees entered into a building contract with [ABC] Homes Limited (the builder) to construct the property.

[4] The builder subsequently entered into a contract with [DEF] Specialists Ltd [(DEF)] to construct a two-level concrete slab for the dwelling.

[5] [DEF] instructed an engineer (Mr BM) to provide engineering advice in respect to the slabs that were to be constructed.

[6] The slabs were built.

[7] The trustees considered the work to be defective.

[8] Mrs EL was engaged to represent the trustees. She took steps to cancel the contract. The lawyers acting for the builders issued a notice requiring the parties to attend mediation.

[9] It was the view of the builder's lawyers that the building contract required the parties, in the event of any dispute, to attempt to resolve the dispute through mediation.

[10] In June 2013, the trustees issued proceedings in the High Court. Those proceedings were issued against:

(a) the builder as first defendant;

(b) [DEF] as second defendant; and

(c) Mr [BM] as third defendant.

[11] The response of the first and third defendants to the proceedings was to file notices of protest to jurisdiction in the High Court. It was the first and third defendants' view, that the dispute resolution clause in the building contract constituted an arbitration agreement, and that the clause precluded the trustees from issuing proceedings in the High Court.

[12] Mrs EL filed an application to set aside the challenge to jurisdiction. Mrs EL did not consider that the building contract required the parties to submit to arbitration in the event of the parties becoming embroiled in a dispute.

[13] The challenge to jurisdiction came before the High Court in early November 2013, and the Court issued a judgement on [Date]. In that judgment, the Associate Judge determined that the parties were bound by an arbitration agreement and accordingly, orders were made dismissing the application to set aside the protest to jurisdiction.

[14] Mrs EL filed an application to review the High Court judgment.

[15] The trustees became dissatisfied with the representation they had received from Mrs EL. They sought an opinion from another firm of solicitors, JKL (JKL).

[16] In the course of receiving advice from [JKL], the trustees say that [JKL] expressed surprise that the judgment issued by the High Court failed to mention s 11 of the Arbitration Act 1996 (the s 11 argument).

[17] Mrs EL's retainer was terminated around December 2013, following which she rendered her final invoice.

[18] [JKL] raised the s 11 issue with the lawyers for the first defendant and argued in the application for review of the judgement, that s 11 had relevance to the proceedings. The first and third defendants consented to having their protest to jurisdiction set aside.

[19] Some considerable time later, a second mediation took place, at which settlement was reached.

[20] The trustees were dissatisfied with the service provided by Mrs EL, and unhappy about the invoice she had rendered when her retainer had been terminated.

The complaint and the Standards Committee decision

[21] The trustees lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 11 December 2014. The substance of the Trust's complaint was that:

(a) Mrs EL had wasted costs in advancing an unsuccessful application to set aside notices of protest to the High Court's jurisdiction;

(b) Mrs EL had failed to raise s 11 of the Arbitration Act. Had she done so, costs of in excess of $30,000 would have been avoided; and

(c) Mrs EL's fee for costs incurred in preparing her file for handover were excessive.

[22] Mrs EL provided a response to the complaint.

[23] In that response, she set out a comprehensive background, explaining that this background had "direct relevance to the legal issue claim, the procedural issue and costs relating to that and the uplift of the file".

[24] In explaining that background, Mrs EL advised that:

(a) her instructions had primarily come from Dr TE;

(b) she had explained her hourly rate to her clients. That rate had remained the same since around 2008 and was significantly lower than the rate that had been charged when she had been a partner in a law firm;

(c) the matter commenced with a degree of urgency and continued in that fashion throughout;

(d) attendances required were intense. The amount of email contact and telephone and personal contact with her clients was, in her experience, unusually extensive;

(e) the case required her constant attention;

(f) her clients did not wish to continue with the building contract in any circumstances;

(g) the protesting defendants did not take the usual step of applying for a stay;

(h) following receipt of the Court's decision in respect to the interlocutory application, she made an appointment to meet with her clients. At that meeting her clients introduced her to a Mr WX;

(i) Mr WX was introduced to Mrs EL as a barrister who did not hold a practising certificate. Mr WX advised Mrs EL that he had an association with JKL;

(j) despite concerns being expressed at that meeting about her representation, Mrs EL says that following the meeting, Dr and Mrs TE reported to her that they were happy with her continuing to represent them;

(k) the review was filed;

(l) she then received correspondence from Mr WX in which Mr WX set out the basis upon which he would work alongside Mrs EL. This suggestion was totally unacceptable to Mrs EL and she advised her clients accordingly; and

(m) she was surprised to receive correspondence from her client's terminating her retainer, as this indication of dissatisfaction with her services did not accord with her view of the positive feedback she had received from her clients.

[25] Having established that background, Mrs EL addresses the specifics of the complaints.

[26] In respect to allegation that she had failed to raise s 11 of the Arbitration Act in support of the application to set aside, Mrs EL says that:

(a) no authority has been provided to substantiate argument that citing the relevant section would have proven to have been a winning argument;

(b) the section needed to be considered in light of the consumer legislation in general;

(c) she did not consider her clients to be consumers; and

(d) there were a number of building contracts that included arbitration clauses where she would be surprised if the parties providing the contracts would accept that owners could refuse to attend arbitration because of s 11.

[27] In response to allegation that fees charged were unreasonable, Mrs EL says that:

(a) time was recorded and frequently discounted; and

(b) much of the work was undertaken as a matter of urgency.

[28] In response to concern that fees charged on handover of the file were excessive, Mrs EL says that she had:

(a) printed emails held electronically as she considered that it would be necessary for discovery purposes to have hard copies; and

(b) charged time for printing and copying at the rate of a legal executive ($150.00 per hour).

[29] The Committee identified the following issues to be considered:

(a) In acting for the trustees in relation to the interlocutory application to set aside notices of protest, did Mrs EL fail to raise s 11 of the Arbitration Act? If so, did that mean Mrs EL had failed to act competently and in accordance with the duty to take reasonable care?[1]

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.

(b) If Mrs EL failed to raise s 11 of the Arbitration Act, did that mean the fees Mrs EL charged the trustees in relation to that application were not fair and reasonable?[2]

(c) Were the fees charged by Mrs EL in relation to the handover of files to the trustee's new lawyers fair and reasonable?

[30] The Committee delivered its decision on 2 September 2015 and determined, pursuant to s 152 (2)(c) of the Lawyers and Conveyancers Act 2006 (the Act) to take no further action in respect to the complaints.

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

(a) it was more likely than not that Mrs EL had failed to consider s 11 of the Arbitration Act;

(b) there was no formal adjudication of the application of s 11 before the court;

(c) the Committee had no material before it that supported the complainant's view that the defendants would have withdrawn their protests to jurisdiction if s 11 had been raised earlier;

(d) there was no evidence to support the view that the s 11 argument would have been a winning one;

(e) it was persuaded by Mrs EL's analysis that there were a number of problems with the s 11 argument;

(f) Mrs EL's failure to consider the s 11 argument cannot be said to amount to unsatisfactory conduct — particularly in circumstances where the success of the s 11 argument was unclear;

(g) none of the fees charged by Mrs EL, considered in isolation, were unreasonable;

(h) fees charged by Mrs EL were fair and reasonable for the services provided; and

(i) whilst the Committee had serious reservations as to whether Mrs EL should have charged the trustees for her time in collating the emails, it

[2] Rules 9 and 9.1.

ultimately did not find this error amounted to unsatisfactory conduct, although the conduct came close to the threshold.

Application for review

[32] The trustees filed an application for review on 5 October 2015. The outcome sought is "a refund of the wasted costs paid to Mrs EL".

[33] The trustees submit that:

(a) the Committee had suggested that their complaint was that Mrs EL should have anticipated the protest to jurisdiction before filing proceedings when their complaint more precisely put, was that Mrs EL should have considered the s 11 argument once the protest was made and raised this with the defendants in response;[3]

(b) the Committee failed to give sufficient weight to the fact that once JKL raised the s 11 argument, the defendants withdrew their protest;

(c) the Committee was wrong to conclude that it could not determine the position the defendants would have taken had the s 11 argument been raised before the hearing;

(d) the Committee was wrong to conclude that there was no evidence to support the view that the s 11 argument would have been a winning one;

(e) the Committee had placed too much weight on Mrs EL's post-factum explanation for why she considered the s 11 argument would not have succeeded;

(f) the critical point is that Mrs EL had failed to consider the s 11 argument; and

(g) the fee charged of $3,398.25 for printing emails without instructions to do so, was clearly unreasonable, particularly given the presumption in the High Court rules that discovery is given electronically and in light of the modest sum claimed.

[34] Mrs EL was invited to comment on the review application. She advised that she placed reliance on the submissions filed with the Committee.

[3] An approach the Applicants say was adopted (with success) by their new counsel.

Review on the papers

[35] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) 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.

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

Nature and scope of review

[37] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[4]

> … 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.

[38] More recently, the High Court has described a review by this Office in the following way:[5]

> 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.

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

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

(a) consider all of the available material afresh, including the Committee's decision; and

(b) provide an independent opinion based on those materials.

Analysis

[40] The issues to be considered on review are:

(a) Did Mrs EL fail to provide the trustees with competent advice in regard to the interlocutory application to set aside notices of protest to jurisdiction?

(b) If the answer to (a) is yes, did that failure merit a disciplinary response?

(c) If the answer to (a) and (b) is yes, should Mrs EL be required to reimburse the trustees a portion of the fees paid?

(d) Was the account rendered by Mrs EL for work completed at the end of the retainer fair and reasonable?

Issue 1 — Did Mrs EL fail to provide the trustees with competent advice in regard to the interlocutory application to set aside notices of protest to jurisdiction?

[41] In the course of providing regulated services to their client, a lawyer must act competently, and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.[6]

[42] A lawyer's conduct may be deemed to be unsatisfactory if, in the course of providing regulated services to their client, their conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[7]

[6] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.
[7] Lawyers and Conveyancers Act 2006, s 12(a).

[43] The duty to act competently has been described as "the most fundamental of a lawyer's duties" in the absence of which "a lawyer's work might be more hindrance than help".[8]

[44] The standard of competence is an objective one. The question is whether the lawyer under scrutiny applied the care or skill that any reasonable lawyer in the same position would have done.[9]

[45] It has been noted that lawyer competence, though pivotal to public confidence in the profession and the administration of justice, lacks any generally accepted meaning; it instead takes its flavour from the perspective of the observer.[10]

[46] Not surprisingly, neither the Act, nor the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), attempt to lay down a definitive definition of competence, a determination of which must inevitably be attempted through an examination of a variety of factors including, but not limited to, the nature of the retainer and the context in which the conduct complaint arises.

[47] It is important to recognise that an obligation to provide competent advice does not impose unreasonable burden on a practitioner to be always right, or to always provide the right advice.

[48] It has been noted that:[11]

> while there is an existing professional duty of competence in New Zealand, albeit one which is particularly narrow, there is no duty to provide a high level of service to clients. The duty of competence is, in reality, a duty not to be incompetent and is aimed at ensuring minimum standards of service.

[49] What may on first reading present as a singularly less aspirational objective for a profession than would be expected is, on closer examination, an affirmation of a reasonable standard of expectation of the level of competency required of lawyers. All lawyers are expected to provide a competent level of service to their clients.

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[8] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington 2016) at [11.1].
[9] At [11.3].
[10] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [4.24].
[11] Webb, Dalziel and Cook, above n 8 at [11.3].

[50] A broad, and useful expression of the indicia to be considered in determining competency was attempted by the American Bar Association in a discussion document where it said:[12]

> Legal competence is measured by the extent to which an attorney(1) is specifically *knowledgeable* about the fields of law in which he or she practises, (2) performs the techniques of such practice with *skill*, (3) manages such practices *efficiently*, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) *properly* prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically *capable*. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities.

[51] The trustees' criticism of Mrs EL's competence, is confined to the issue of her failing to raise the s 11 issue either directly, or in response to, the defendant's protest to jurisdiction.

[52] In what was, as I perceive it to be, a retainer where there was a considerable degree of urgency, and a high level of engagement between lawyer and client (particularly engaging Dr TE as he appeared to be primarily responsible for looking after the trustees' interests), there is no indication of Mrs EL's clients having expressed any dissatisfaction with her services until the point where the Court had rejected the application to dismiss the protest to jurisdiction.

[53] The criticism that Mrs EL failed to provide competent advice, is focused on argument that she should have:

(a) been aware of the relevance of s 11 of the Arbitration Act; and

(b) appreciated that raising the s 11 argument in her application to dismiss the protest to jurisdiction would have created difficulties for the defendants; or

(c) considered the s 11 argument once the protests were made and raised the argument with the defendants.

[54] Mrs EL is accused of making a litigation blunder that both prolonged and increased the cost of the litigation.

[55] The trustees are critical of the explanations provided by Mrs EL for her failure to raise the s 11 argument. It is their view that Mrs EL failed to recognise (as they consider she should have) the availability of the s 11 argument, and having overlooked

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[12] American Bar Association and American Law Institute *Committee on Continuing Professional Education Model Peer Review System* (discussion document, 15 April 1980).

the option, had endeavoured in responding to the complaint to provide explanations for the omission after the event.

[56] Central to the argument advanced by the applicants is their contention that the error they allege to have occurred was so fundamental as to inevitably raise issue of Mrs EL's competency.

[57] It is so obvious as to approach the trite, that conduct issues do not inevitably arise because a particular litigation strategy advanced by a lawyer has been unsuccessful.

[58] In *LCRO 262/2014* the Review Officer noted that:

> [116] Although there are rules of engagement for litigation, such as procedural and evidential rules, as well as the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)), the conduct of litigation is largely an inexact science driven by tactical and strategic decisions made by the opposing parties.
>
> [117] One lawyer's view of the most effective strategy to conduct litigation may be diametrically opposed to another lawyer's view and, absent incompetence, it is not always possible to determine which view is the better.
>
> [118] Again, absent incompetence, tactical and strategic advice given by lawyers to their clients will be informed by that lawyer's experience as well as their assessment of the other party's position. It is, in many respects, a battle of wits and wills.

[59] It has also been noted that a lawyer "is not bound … to exercise extraordinary foresight, learning or vigilance".[13]

[60] Whilst the trustees did not specifically describe the error contended to have been made by Mrs EL as fundamental, I have described their assessment of Mrs EL's failure to plead s 11 in these terms as it appears to me, that if the trustees are suggesting that Mrs EL's error (as they perceive it to be) merits a disciplinary finding, they must at first step establish that the error alleged to have been made was so fundamental, obvious and basic, that the failure must reasonably, on any objective analysis, be seen to be reflective of a practitioner who has failed to meet the duty of competence owed to their client.

[61] It falls to the applicants to establish that Mrs EL's failure to raise the s 11 argument was a fundamental error of sufficient gravity to merit the consideration of a disciplinary sanction.

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[13] *Jennings v Zilahi-Kiss* (1972) 2 SASR 493 (SC) at 512 cited with approval in Dal Pont above n 10.

[62] They must establish that Mrs EL made an error, that the error was fundamental, and that the error was so serious that it could not be excused or explained by argument that Mrs EL was simply advancing a litigation strategy that was open to her.

[63] To establish grounds for a disciplinary finding, it must be able to be concluded with confidence that it would be expected that it would be approaching the axiomatic in the circumstances confronted by Mrs EL, that she would have pleaded the s 11 argument.

[64] The critical question to consider at this juncture is whether the failure complained of was fundamental and obvious.

[65] Dr TE, for the trustees, acknowledges that he is not lawyer. That acknowledgement is simply a proper admission on his part that he is not, as a layperson, (albeit an obviously capable and competent one) equipped to definitively assess the legal consequences of Mrs EL's failure to promote the legal strategy he considers would have been most beneficial to the trustee's case.

[66] Rather, Dr TE points to the advice provided by the lawyers who replaced Mrs EL, and the response by the defendants to being confronted with the s 11 argument, as compelling evidence of Mrs EL's failure.

[67] On 23 January 2014, JKL wrote to the first defendant's lawyers. In that correspondence, JKL advised that it was their view that "irrespective of the merits of the interpretation argument, the arbitration agreement between our clients and your client is unenforceable under s 11 of the Arbitration Act".

[68] JKL expressed surprise that the s 11 argument was not raised before the Associate Judge and signalled an intention to raise the argument on review.

[69] The first and third defendants subsequently consented to have the protest to jurisdiction set aside.

[70] The trustees view this as a capitulation on the part of the defendants, and compelling evidence of a failure on Mrs EL's part to advance an argument that would have settled the protest to jurisdiction argument promptly, without need for the trustees to incur the legal costs of opposing the jurisdiction argument and advancing an application to review the Court's decision.

[71] It is understandable that the trustees perceive the response of the defendants to JKL's raising of the s 11 argument to be strongly indicative of a concession on the part of the defendants, and an apparent acknowledgement by the defendants of the merit and strength of that argument.

[72] The trustees are critical of the weight placed by the Committee on Mrs EL's explanation for failing to plead the s 11 argument, and note that the defendants:

> did not have to accept the s 11 argument raised by JKL. They could have let the review proceed to hearing. They did not. Instead they withdrew their protest. This too was evidence that the argument would have succeeded.

[73] They fairly ask, if the s 11 argument stopped the defendants in their tracks, did that not reinforce that it was beholden upon Mrs EL to raise the argument and was her failure not do so, clearly indicative of a lack of competency?

[74] Whilst I accept that the trustees are convinced that the decision of the defendants to abandon their position is compelling evidence that the s 11 argument was impenetrable, more is required when considering a complaint that a practitioner has failed to provide competent representation in a litigation matter than evidence that a party in the proceedings has made concessions in the face of a different strategy being adopted by a different lawyer.

[75] Evidence of the defendants changing their position, is not so compelling as to provide incontrovertible evidence of a failure on Mrs EL's part.

[76] There can be a number of explanations as to why a party engaged in litigation may choose to abandon a stance it has pursued in the course of that litigation. Some of those reasons may be tactical, some legal, some commercial.

[77] Whilst the trustees indicate that their counsel had been told that the defendants would not have proceeded with their protest to jurisdiction if the s 11 argument had been raised earlier, there was no evidence before the Committee or before this Office from the defendants, nor would it necessarily be the case that if that was in fact the defendants position, that this would inevitably establish that Mrs EL had failed to provide the trustees with competent representation.

[78] It is problematical to attempt to second-guess the reasons as to why a particular decision has been made at a particular time, in the course of particular litigation.

[79] It is relatively common, in the course of litigation, for a party to abruptly change tack. Whilst it is unwise to speculate on possible alternative explanations for the defendants decision to abandon their protest to jurisdiction, it cannot, with the degree of

certitude necessary, be said that the defendants position was prompted by their recognition that the trustees position had become unassailable as a consequence of the raising of the s 11 argument which it is said by the Trustees, had been overlooked by Mrs EL.

[80] That degree of certitude must be reached, if contemplation is to be given to imposing a disciplinary finding which has consequences for a lawyer's professional reputation.

[81] The trustees do not however rely solely on argument that the defendant's apparent acquiescence established the disciplinary breach of which they make complaint. They note that the lawyers instructed following the termination of Mrs EL's retainer, expressed surprise that Mrs EL had failed to raise the s 11 issue before the Associate Judge, as they considered that the provision had "direct relevance" to the proceedings.

[82] The trustees invited JKL to comment on Mrs EL's analysis of the relevance of the s 11 argument. In providing their response, JKL makes it clear that they did not agree with the approach adopted by Mrs EL:

> We do not agree with Mrs EL's view of the law. The cases cited and references to the Consumer Guarantees Act do not, in our view, support Mrs EL's argument that you were not consumers for the purposes of the Arbitration Act. More importantly, however, the fact that the argument may involve some risks does not, in our view, excuse the fact that she did not advise you on it at all. The suggestion that including s 11 as a ground for setting aside the protests to jurisdiction would have exposed you to further costs is also misguided in our view. It is unlikely that the argument would have added significantly to the hearing – being the only way it could have impacted on the defendant's scale costs entitlements (had it been unsuccessful).

[83] Whilst JKL's views must be given careful consideration, they could not, and cannot, be accorded such significance as to be determinative of the question as to whether Mrs EL provided competent representation.

[84] Lawyers will not infrequently hold diametrically opposed views as to the strategy that should be adopted in a particular case.

[85] Attention then necessarily turns to the arguments advanced by Mrs EL.

[86] It is her contention that there was no guarantee that advancing the s 11 argument would have been successful.

[87] She believes that there were significant hurdles, particularly around the question as to whether the trustees would, for the purposes of s 11, be classified as consumers.

[88] She was, she says, instructed that there was an intention that one of the two houses to be built on the site, would be on sold.

[89] She questions whether it would be likely, considering that the agreement was negotiated in the name of a family trust, whether Dr and Mrs TE (if they were to occupy a home built on the section) would fall within the definition of "individual" purchasers, for the purposes of s 11.

[90] Mrs EL cites authority to support her view that it was not unreasonable for her (and certainly not approaching the negligent) to form a view that s 11, with its focus on consumer protection, would have had no application.

[91] Further, she requests that the actions taken, be considered in the context in which the litigation was proceeding. She argues that particular attention should be paid to the following:

(a) Her consistent instructions were to proceed the matters with urgency.

(b) The steps taken (and lack of steps taken) by the defendants.

(c) Her assessment that an interlocutory application was required to prompt a response from the defendants.

(d) That the decision to advance an interlocutory application, was not taken in isolation.

[92] In summary, Mrs EL argues that there was a sound legal basis for the step she had taken which reflected both the practicalities of the situation she was dealing with in terms of protecting her client's interest and was appropriately responsive when considered in the context of dealing with defendants who appeared to be focused on attempting to prolong the litigation.

[93] It is important at this juncture, to emphasise that it is not the role of a Review Officer to determine points of law.

[94] It is critical that neither Standards Committees nor the Review Office, when considering issues of the nature engaged by this review, do not turn the complaints/review process in to what it is not — a court of civil justice.

[95] This jurisdiction is not one vested with the civil justice jurisdiction. It does not operate as a parallel pathway to civil justice. It is primarily concerned with the maintenance of professional standards.

[96] Argument that a lawyer's oversight or omission has compromised a party's case before the court to the extent that the error has resulted in the incurring of costs (including legal costs) that would not have resulted, but for the failure on the part of the lawyer, raises the possibility that the lawyer's actions may be addressed not by reference to argument of a lack of competence, but rather a consideration as to whether the lawyer's conduct amounted to negligence.

[97] The relationship between the tort of negligence and unsatisfactory conduct as defined in s 12(a) is close. In the Introduction to the chapter on negligence in *The Law of Torts* the authors state:[14]

> Negligence is a relatively straightforward and well-understood concept in lay terms. It is defined in the *Concise Oxford Dictionary* simply as a lack of proper care and attention or carelessness. This broad notion of carelessness is undoubtedly an integral part of negligence as a foundation for legal liability, but other elements are also involved. If one or more of those elements is lacking, then an action will fail, even though the defendant may have been careless, even grossly so, in a popular sense.

[98] Negligence is a cause of action that is well-understood by traditional civil courts. Its ingredients include a duty of care, a breach of that duty, and a measurable loss that has been caused by the breach of duty. Findings of negligence may only be arrived at after comprehensive — sometimes expert — evidence has been given. Issues that often arise in claims of negligence include whether a person has breached their duty of care, or whether there is a connection between the alleged loss and the breach of duty. Complex arguments often arise about whether any loss has been suffered.

[99] Neither a Standards Committee nor the LCRO is equipped to make findings of negligence.

[100] It does not fall within my jurisdiction to make findings as to whether the Trustees were consumers in the terms as prescribed by s 11 of the Arbitration Act, or whether the circumstances of the proposed ownership and the plans for development of the site, excluded the trustees from an obligation to submit to arbitration.

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[14] *The Law of Torts in New Zealand, Todd (ed)* (online edition, Thomson Reuters) at [5.1].

[101] That issue, if contested, could only be determined by a court of competent jurisdiction, following the hearing of evidence.

[102] This is not to abrogate either the responsibility or obligation of this Office to address competency complaints, in circumstances where there is argument that a lawyer has, in the course of litigation, failed to adequately plead their client's case, but rather to emphasise that the ability of this office to determine such complaints is fettered if a determination of the complaint requires the Review Officer to act as an arbiter of competing legal arguments.

[103] I do not overlook that the trustees argue that Mrs EL's failure to plead the s 11 argument was a breach so fundamental that the oversight must inevitably raise a competency issue, but I am not persuaded that the failure to plead was an oversight that was so demonstrably erroneous, that, viewed objectively, would lead to conclusion that Mrs EL failed to apply the skill and care that any reasonable lawyer in the same position would have done.

[104] Mrs EL's submission that there were significant obstacles in the path of the s 11 argument raises contestable issues that cannot be determined on review.

[105] Significantly, the competing arguments were not tested before the court.

[106] Mrs EL does, in my view, raise legitimate argument that her strategy was a reasonable one, and a strategy that was tailored to, and conditioned by, the circumstances she was dealing with.

[107] I do not overlook the fact that the Committee concluded that it was "more likely than not" that Mrs EL had failed to consider s 11 of the Arbitration Act, but I agree with the Committee that the oversight, if there was one, was not fatal to Mrs EL's position.

[108] Whilst Mrs EL, in providing response to the complaint is accused of bringing the acuity of hindsight to her response, that does not diminish the relevance of the arguments she raises. Importantly, and I think fairly, she argues that her conduct must be considered in the broad context of the issues she was confronting at the time.

[109] Having considered the matter afresh, as I am required to do, I agree with the Committee that no breach of professional standards occurs as a consequence of the approach adopted by Mrs EL.

Was the account rendered by Mrs EL for work completed at the end of the retainer fair and reasonable?

[110] A starting point for a consideration as to whether a fee charged by a lawyer is fair and reasonable is an examination of rr 9 and 9.1 of the Rules.

[111] Rule 9 provides:

> A lawyer must not charge a client more than a fee that is 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 rule 9.1.

[112] Rule 9.1 provides:

> 9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:
>
> (a) the time and labour expended:
>
> (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
>
> (c) the importance of the matter to the client and the results achieved:
>
> (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
>
> (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:
>
> (f) the complexity of the matter and the difficulty or novelty of the questions involved:
>
> (g) the experience, reputation, and ability of the lawyer:
>
> (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
>
> (i) whether the fee is fixed or conditional (whether in litigation or otherwise):
>
> (j) any quote or estimate of fees given by the lawyer:
>
> (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and the client:
>
> (l) the reasonable costs of running a practice:
>
> (m) the fee customarily charged in the market and locality for similar legal services.

[113] The process of determining a fair and reasonable fee is "an exercise in balanced judgment - not an arithmetical calculation":[15]

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

[114] It is important to note the framework provided by the Act in respect of complaints relating to lawyer's bills of cost.

[115] A complaint relating to a bill of costs is treated in the same way as a complaint about any other conduct of a legal practitioner. Complaints are made pursuant to s 132(2) of the Act. All complaints, including complaints about bills of cost fall to be considered within the disciplinary framework of the Act.

[116] The focus of a Standards Committee and the LCRO is on whether the practitioner's conduct is deserving of professional discipline.

[117] It is from that context that the reasonableness of Mrs EL's final invoice must be considered.

[118] Mrs EL's final account of $3,989.25 (inclusive of GST), was rendered on 22 January 2014.

[119] The recorded time spent for work comprised in the final account is broken into two parts, firstly 13.7 hours charged at a reduced hourly rate of $150 per hour for reviewing, printing and ordering emails, secondly 2.5 hours for work engaged in responding to the defendant's lawyer and preparing a memorandum for the court, that work charged at Mrs EL's usual rate of $360 per hour.

[120] It is the first component of the charges that are objected to, being the fee charged for reviewing and copying email correspondence.

[121] I see no indication of the trustees either in their initial correspondence to Mrs EL in which they raise their concerns, or in the formal complaint and review application that followed, objecting to the fees charged by Mrs EL in responding to counsel's emails and preparing the court memorandum.

[122] The question is then, whether the fee charged of $2,363.25 for reviewing, collating and photocopying emails, was fair and reasonable.

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

[123] The Committee noted that it would have been preferable for Mrs EL to have provided the emails in an electronic format, but ultimately found that this error in judgement did not amount to unsatisfactory conduct, "although this type of conduct certainly came close to the threshold".[16]

[124] In my view, the question to address is not whether as the Committee described it, Mrs EL had made an error of judgement, but whether the fee charged by her for preparing the file for handover, was fair and reasonable.

[125] The retainer was on foot from March 2013 to January 2014.

[126] Twelve invoices were rendered in the course of the 11-month retainer.

[127] Mrs EL has characterised the retainer as being one in which there was both a high level of urgency, and a considerable level of engagement on the part of her client.

[128] On receipt of request to uplift the file, Mrs EL set about reviewing and printing emails (both received and sent) from her inbox.

[129] I assume it to be the case that Mrs EL had opened a separate email folder to store all of the email communications relating to the trust. She could not have provided a coherent and efficient system for managing all emails received in the course of her practice without establishing separate directories for her clients, particularly in circumstances where the email traffic for a particular client was, as was the case here, voluminous.

[130] If that was the case, it would have been a straightforward task for Mrs EL to have simply downloaded the emails onto a USB stick.

[131] The explanation provided by Mrs EL for her decision to review, collate and print the emails, was that she considered it would be necessary for her clients to have the information in hard copy form, in order for them to complete discovery.

[132] She noted that, "I knew the task would have been necessary for discovery purposes, had the file not been uplifted".

[133] Further, she says that "this exercise was not one that I would have undertaken until needed for discovery had the clients not wanted to uplift the file as it involved further time".

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[16] Standards Committee determination, 2 September 2015 at [46].

[134] It is clear then, that Mrs EL's decision to take what was clearly a labour-intensive task involving more than one and a half days of her time, was prompted by a belief that providing information in hard copy form would assist her clients with the discovery process.

[135] Whilst seemingly well-intentioned, Mrs EL's decision to respond to request for the file by electing to provide information in a printed format that she considered would allow for discovery to be completed, was to take matters a step further than was anticipated by the instructions provided.

[136] Bearing in mind the volume of materials (she notes that she had provided a file of approximately 2000 pages) it would have been appropriate for Mrs EL to have given careful consideration as to whether she should properly have put her client to the expense of a further day and a half's work, albeit that her hourly rate was adjusted to recognise the essentially administrative nature of the tasks involved.

[137] Mrs EL says that she was required to review the emails and to assemble them, but she provides no indication as to what was involved in this process.

[138] The trustees contend (and there is no evidence advanced by Mrs EL to disavow their position) that it was not apparent from the printed emails received, that the emails had been reviewed in any meaningful or helpful way.

[139] There is no indication that Mrs EL had attempted any categorisation of the material, for example a classification as to whether the material was discoverable or raised issues of privilege.

[140] At the time Mrs EL received instructions to dispatch the file, it would not have been known to her whether the email correspondence reviewed would have been required for discovery purposes. It may have been the case that the litigation would proceed to the point where the parties were required to complete discovery, but Mrs EL could not have been certain as to whether that would be the case.

[141] As an experienced litigator, Mrs EL would also have been aware of the possibility that discovery would, either at the direction of the Court, or with the consent of the parties, be undertaken fully or partly in a digital format.

[142] Directions provided by the High Court Rules in respect to discovery in force at the time of the litigation emphasised that parties to litigation must, when appropriate:

(a) consider options to reduce the scope and burden of discovery; and

(b) achieve reciprocity in the electronic format and processes of discovery and inspection; and

(c) ensure technology is used efficiently and effectively; and

(d) employ a format compatible with the subsequent preparation of an electronic bundle of documents for use at trial.

[143] I think it probable (considering the nature of the retainer as described by Mrs EL) that a number of the emails would simply not be discoverable.

[144] All emails between her and her clients are privileged. Issues of discovery do not arise with that material.

[145] All emails between her and her witnesses/experts are also protected by litigation privilege.

[146] All emails between her and the lawyers on the other side will be in the possession of those lawyers. For discovery purposes one generally has a generic reference to "correspondence between the parties' legal advisers" (or similar).

[147] I presume that emails between her and the Court would also have been copied to the other side's lawyers.

[148] So it seems probable that she would have very few emails that could come into the category of discoverable material.

[149] Mrs EL, in providing response to suggestion that her overall fees were unreasonable, explained that she calculated her fee by reference to recorded time, but notes that when setting her fee she took into account a number of factors, including her desire to "maintain overall goodwill" with her client.

[150] She notes that she had not printed the emails held electronically prior to receiving request for her file, as she was "aware that this would be particularly time consuming in this case". As has been noted, she says that she was aware that she considered that she would be required to have hard copies, if "necessary for discovery purposes".

[151] That may well be the case, but printing an email when received or sent, and placing the hard copy on file, presents as a less time consuming exercise than reviewing, collating and copying emails at a later date, being the process described by Mrs EL as having been undertaken on receipt of the request to uplift the file.

[152] If Mrs EL was maintaining an efficient digital system for storing email correspondence, it would have been, as has been noted, a relatively easy task for her to simply provide the file in digital format.

[153] I accept that Mrs EL may have considered it prudent to review the emails before passing the file over, but that exercise could, in my view have been completed relatively quickly. She was familiar with the material, most of which it could be reasonably assumed, would require only a quick perusal from her. But the process described by Mrs EL presents in my view as ponderous and overly time consuming of her time.

[154] Having given careful consideration to the relevant fee factors and the fee charged for the task completed, I respectfully disagree with the Committee that Mrs EL's conduct in charging for collating the emails was conduct which came close to the threshold of unsatisfactory, in my view the threshold was crossed.

[155] I do not consider the fee charged by Mrs EL for copying the emails was fair and reasonable having regard to the interests of both lawyer and client.

[156] In reaching that view, I give weight to the following factors:

(a) Mrs EL undertook work that exceeded the scope of her instructions.

(b) The time and labour expended (r 9.1) was excessive considering the limited scope of the instructions, which were to provide the client's file.

(c) There is no evidence that the emails were assembled or collated in a form that reflected organisational work on the part of Mrs EL that would have been of assistance to JKL.

[157] Her failure to charge a fee that was fair and reasonable amounted to unsatisfactory conduct pursuant to s 12(c) of the Act.

[158] It is however reasonable that Mrs EL be reimbursed for some of the time spent in finalising matters relating to the preparation of the file for providing to her client's new lawyers. I consider one hour to be reasonable and consider that she should be reimbursed for that work at her standard hourly rate.

[159] As has been noted, there is no objection raised to the component of Mrs EL's invoice which related to her liaising with opposing counsel and the preparation of the Court memorandum.

[160] I consider a fair and reasonable fee for her final invoice (tax invoice 848) to be $1,449.00 (inclusive of GST).

[161] Mrs EL is to refund the trustees the sum of $1,949.25.

Costs

[162] Where a finding of unsatisfactory conduct is made or upheld against a practitioner on review it is usual that a costs order will be imposed. I see no reason to depart from that principle in this case.

[163] Taking into account the Costs Guidelines of this Office, the practitioner is ordered to contribute the sum of $900 to the costs of the review, that sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

[164] The order for costs is made pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006.

Publication

[165] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006 I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

Decision and Orders

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006:

(a) The decision of the Standards Committee that the fees charged by Mrs EL in relation to the handover of the file to the trustee's new lawyers did not amount to unsatisfactory conduct is reversed and an unsatisfactory conduct finding entered pursuant to s 12 (c) of the Lawyers and Conveyancers Act 2006.

(b) The decision that Mrs EL had acted competently in relation to the interlocutory application to set aside notices of protest to jurisdiction is confirmed.

(c) The decision that fees charged by Mrs EL in respect to the attendances relating to the protests to jurisdiction were fair and reasonable is confirmed.

(d) Mrs EL is to pay to the R & N Family Trust pursuant to s 156(1)(e) (g) of the Lawyers and Conveyancers Act 2006, reimbursement of fees paid in the sum of $1,949.25.

(e) Mrs EL is to pay to the New Zealand Law Society the costs ordered on this review in the sum of $900 pursuant to s 210 of the Lawyers and Conveyancers Act 2006, those costs to be paid within 30 days of the date of this decision.

(f) The order for costs made may pursuant to s 215 of the Lawyers and Conveyancers Act 2006 be enforced in the civil jurisdiction of the District Court.

(g) This decision is to be published in the terms as set out in the decision, pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006

DATED this 27th day of June 2019

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R Maidment
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Trustees of the R & N Family Trust as the Applicants
Mrs EL as the Respondent
[Area] Standards Committee [x]
New Zealand Law Society