

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

BETWEEN

AB

Applicant

AND

CD

Respondent

DECISION

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

Introduction

[1] Mr CD, a barrister, acted for Ms AB, her sister Ms EB, and Ms EB's company, JJ Holdings Limited ([JJ]), on a property dispute.

[2] Ms AB has applied for a review of a decision by the [Area] Standards Committee (the Committee) to take no further action in respect of her complaint about Mr CD's fees when acting on that matter.

[3] In her complaint, Ms AB also alleged that Mr CD, in order to settle the dispute, had failed to submit Ms AB's counteroffer, had failed to give her advice about the alternatives to litigation and had failed to include a term in a settlement agreement. The Committee considered these allegations and a separate decision, as did this Office in respect of Ms AB's application for a review of that decision.

[4] In November 2014, Ms AB sold a residential property (the property) to Mr B and Ms T KL (the vendors). In early January 2015, the vendors and [JJ] signed an agreement

for sale and purchase (the sale agreement), whereby the vendors were to sell the property to [JJ]. No settlement date was specified in the sale agreement.

[5] Unable to agree on settlement of the transaction, on 12 June 2015, in order to protect its interest pursuant to the sale agreement, [JJ] lodged a caveat against the title to the property. In early July 2015, the vendors made applications to the High Court first, to have the caveat removed,¹ and secondly, for an injunction restraining [JJ] from selling the property.²

[6] Mr CD was instructed by Mr GH of [XB] Legal, who acted for [JJ]. A Notice of Opposition to the vendors' proceedings was filed in the High Court on 10 July 2015.

[7] Mr GH unsuccessfully tendered settlement of the proposed purchase on 18 and 28 September 2015. The vendors' lawyer responded on 6 October 2015 with the vendors' offer to sell the property to [JJ] for \$509,000.

[8] On 8 October 2015, Ms AB informed Mr CD that she and Ms [EB] wanted to make a counteroffer of \$469,000. The following day, 9 October 2015, Mr GH informed the vendors' lawyer that [JJ] rejected the vendors' offer of \$509,000. Mr GH stated that [JJ] would pay \$455,000 for the property as provided for in the sale agreement.

[9] A defended hearing of the vendors' application to remove the caveat was heard on 28 October 2015 by the High Court. In its decision delivered on 13 November 2015, the Court sustained [JJ]'s caveat on the condition that [JJ] commence proceedings for specific performance within fourteen days, and "prosecute[d] [that] claim ... promptly".³

[10] An approach by Mr CD to the vendors' counsel in early May 2016, to explore settlement options, and his attempt in September 2016 to arrange mediation, were both unsuccessful.

[11] The dispute was ultimately settled, after four days of negotiation, on 15 November 2016, the first day of the scheduled High Court hearing.

[12] Mr CD sent his letter of engagement to [JJ], Ms AB and Ms [EB] on 13 July 2015. He informed them that his "usual hourly rate is \$550 plus GST", which he reserved the right "to amend ... from time to time in line with changes to market rates".

¹ *KL v [JJ] Holdings Ltd* [2015] NZHC [XXXX].

² *KL v [JJ] Holdings Ltd* [2015] NZHC [XXXX].

³ *KL v [JJ] Holdings Ltd*, above n 2 at [28].

[13] He stated that “to keep costs to a minimum and/or to progress work”, he may engage the assistance of a junior barrister whose “usual charge out rate ...is \$125 plus GST”. He stated that the cost of his junior barrister’s work would be included in his fee.

[14] From July 2015 to December 2016, Mr CD issued 13 invoices to [JJ], three of which were for disbursements (High Court filing fees). Ms OP, a junior barrister who assisted Mr CD on aspects of the work, issued two invoices to Mr CD.

Complaint

(1) Initial complaint

[15] Ms AB lodged a complaint with the Lawyers Complaints Service on 28 February 2017.

[16] As noted above, Ms AB claimed Mr CD failed to act in her best interests (a) by not submitting her 8 October 2015 counteroffer to the vendors, (b) by not advising her about the alternatives to litigation to resolve the dispute and (c) by not, as she had requested, including a term in a settlement agreement.

[17] She also complained about Mr CD’s fees invoiced to [JJ] in this matter.

(2) Submissions

[18] In her submissions to the Committee on 6 August 2018, Ms AB provided a background summary of the lead up to her 8 October 2015 email to Mr CD about the counteroffer she wanted to submit to the vendors.

[19] She set out in full s 156(1) of the Lawyers and Conveyancers Act 2006 (the Act), which empowers a Committee, or this Office on review, to make orders when a finding of unsatisfactory conduct is made against a lawyer.

[20] She asked that “appropriate charges” be laid against Mr CD. She sought orders (a) cancelling all of Mr CD’s invoices, including those paid, and outstanding, (b) compensation for lost profits caused by Mr CD’s “negligence and maliciousness” and (c) publication of the Committee’s decision.

(a) Counteroffer

[21] Ms AB stated she had incurred significant legal costs. She stated even if [JJ] was successful in its High Court proceedings against the vendors she would still be “out of pocket [by] tens thousands of dollars”.

[22] She said her main concern was that Mr CD did not, as requested of him in her 8 October 2015 email, submit [JJ]'s counteroffer of \$469,000 to the vendors. She says at that time the difference between the amount sought by the vendors, \$490,000, and her counteroffer, was only \$21,000.⁴

[23] She says Mr CD had not been "compelled" by the Committee "to furnish file notes" in support of his position, yet the Committee stated she "had not provided evidence".

(b) High Court substantive hearing, 15 November 2016

[24] Ms AB claimed Mr CD invoiced [JJ] for this hearing, yet did not prepare for it.

(2) Additional matters

[25] In respect of additional allegations contained in her submissions to the Committee, Ms AB stated that Mr CD:

- (a) Without "disclos[ing]" to her first, informed the vendors' lawyer that she had instructed Mr CD that there was "no point going to court because it's not commercially profitable" for her. She says this "jeopardised" her prospects of "negotiating a settlement".
- (b) Before informing her, told the vendors' lawyer that [Mr CD] "no longer act[ed]" for [JJ].
- (c) Required payment of his outstanding legal fees by 28 January 2018, yet had instructed a debt collector the previous day.

Cost assessment

[26] The Committee appointed Ms MN, a lawyer and senior associate at [YC], to assist with the Committee's inquiry by acting as a costs assessor (the assessor).

(1) Appointment terms

[27] In her comprehensive report, dated 21 June 2018, to the Committee, the assessor stated she had been asked to review Mr CD's fees and, "by implication", Ms OP's fees. She said in making her assessment she had been guided by rr 9, 9.1,

⁴ I note the vendors' 6 October 2015 offer, conveyed by the vendors' lawyer, was \$509,000.

and 9.2 of the Lawyers and Conveyancers Act (Lawyers: conduct and Client Care) Rules 2008 (the Rules).⁵

(2) Person chargeable

[28] She noted that Mr CD, in his letter of engagement, had referred to the clients being [JJ], Ms AB, and Ms [EB]. In the assessor's view, although all of Mr CD's invoices were issued to [JJ], of which Ms AB was neither a shareholder nor director, because Ms AB was a client in the matter and had provided "the bulk of the instructions", she was "entitled to dispute [Mr CD's] charges."⁶

(3) Urgency, client delays

[29] The assessor noted that Mr CD, a barrister, had an instructing solicitor. She noted that "a significant volume of work needed to be done at short notice" and there had been delays by Ms AB "in providing necessary information".

[30] The assessor was not "satisfied" that Mr CD's failure to submit Ms AB's 8 October 2015 counteroffer to the vendors had led to further unnecessary legal expenses. She observed that there was nothing evident on the file "to suggest that an earlier settlement was possible".

(4) Observations

[31] The assessor noted that Mr CD had billed his legal work at the hourly rate, \$550, stated in his letter of engagement, had billed regularly and had sent reminders seeking payment. She noted that Ms AB had not challenged any of the invoices until after the dispute had been settled on 15 November 2016.

[32] She observed that although Mr CD had provided a fee estimate by email on 14 October 2015, further estimates "would have been beneficial". She noted that the proceedings before the Court comprised "a factual dispute", in respect of which Ms AB "was adamant in her denials of the [vendors'] position".

[33] Although stating that Mr CD "could have communicated costings", the assessor found "no justification" to Ms AB's allegations he had "unnecessarily prolonged of the proceedings ... to obtain an increased fee".

⁵ The assessment was also guided by the relevant authorities.

⁶ Lawyers and Conveyancers Act 2006, s 132(2).

(5) Recommendation

[34] I refer to the assessor's recommended reductions in seven of Mr CD's invoices in my later analysis.

[35] Overall the assessor recommended a reduction from total fees of \$60,325 (fee component) plus GST and disbursements, to \$48,137.50 (fee component) plus GST and disbursements, a difference of \$12,187.50 (fee component) plus GST and disbursements — a 20 per cent reduction.

[36] Concerning Ms OP's 7 November 2016 invoice, the assessor considered that the time taken to complete the tasks delegated to her by Mr CD "might be on the upper end of the scale". She observed it was "difficult to make informed comments" about Ms OP's 5 December 2016 invoice.

Response

[37] Mr CD responded to Ms AB's complaint on 31 March 2018 in his email to the Lawyers Complaints Service.

[38] He explained that the attendances which related to each of his invoices were "particularised" in the narration included in each invoice. He said he did not have other time records or supporting information "over and above the documents" he provided to the assessor.

[39] He explained that having stopped using the LawBase software to record time and generate billing reports at the end of 2015, he could provide the assessor "with an analysis of the attendances charged in each invoice".

(1) Invoice summary

[40] In his letter dated 30 May 2018, addressed to the assessor, he explained he had issued 13 invoices in the period from 8 July 2015 to 23 December 2016, in respect of total legal fees of \$60,325 plus GST and disbursements (gross \$70,659.42).

[41] He said Ms OP, a junior barrister who assisted him on certain aspects of the matter, issued two invoices to him in respect of her total legal fees of \$10,920 plus GST and disbursements (gross \$12,558).

[42] He provided a summary of his attendances in respect of each invoice, which included a breakdown of his hours worked allocated to certain aspects of those attendances.

(2) Submissions

[43] In his submissions to the Committee before the hearing, Mr CD largely focused on seven of his invoices, in respect of which the assessor considered his fees were not fair and reasonable and recommended reductions.

[44] He submitted that those fees were fair and reasonable.

[45] I refer to Mr CD's detailed response in support of his position in my later analysis.

Standards Committee decision

[46] The Committee delivered its decision on 8 October 2018 and determined, pursuant to s 152(2)(c) of the Act, to take no further action with regard to the complaint or any issue involved in the complaint.

[47] In reaching its decision that Mr CD's fees were fair and reasonable, the Committee stated it had considered (a) the assessor's report and recommendation, (b) all information submitted by the parties and (c) the fee factors contained in r 9.1 of the Rules.

[48] The Committee noted that Mr CD had informed the assessor that as at 30 May 2018, the balance due to him was \$39,477.61 and Ms OP's two invoices, totalling \$12,558, remained unpaid.

Cost assessment

[49] The Committee noted that the assessor (a) had considered each of Mr CD's invoices, (b) in the absence of Mr CD having time records, had undertaken "a retrospective reconstruction of the work" carried out by Mr CD "in relation to each invoice", and (c) in doing so had considered Mr CD's correspondence and pleadings files, various bound documents and pleadings, access to one drive folder and a memory stick in respect of emails from 7 July 2015 to 8 November 2015.

[50] The Committee noted that whilst Mr CD, on the assessor's recommendation, was prepared to reduce his fees by approximately 20 per cent, Ms AB would not agree.

[51] The Committee focused on the four invoices in respect of which the assessor recommended the greatest reductions in Mr CD's fees.

(2) 8 October 2015 counteroffer — period 1 October 2015 – 23 December 2015

[52] Ms AB's 8 October 2015 counteroffer fell within this billing period. Mr CD's fee, stated in invoice 1444, 23 December 2015, was \$14,500 plus GST and disbursements for 26.36 hours legal work.

[53] Although Ms AB claimed the "result eventually achieved" by Mr CD did not "justify the fees charged", the Committee's view was that it did not follow that if Mr CD had submitted Ms AB's counteroffer to the vendors, the dispute would have been resolved and further legal fees from that point would not have been incurred.⁷

(3) High Court hearing, 28 October 2015 — caveat

[54] The High Court hearing of the vendors' application to remove [JJ]'s caveat fell within this billing period, namely, 1 October 2015 – 23 December 2015.

[55] The Committee considered that "it would have been permissible" under the High Court Rules 2016 (the HCR) for Mr CD's fee on this aspect of the dispute to be more than he had billed in that invoice.

(4) High Court substantive hearing, 15 November 2016 — period 8 – 30 November 2016

[56] Mr CD's fees, \$12,500 plus GST and disbursements for 22.7 hours, included in invoice 78, 5 December 2016, related to his legal work in the lead up to the substantive hearing on 15 November 2016, his appearances at Court and settlement negotiations.

[57] The Committee noted Mr CD's comments that the assessor had not taken into account "the relevant time allocations contained in [sch 3 of the HCR]" and that Mr CD's fee represented "approx 25 [per cent] of [that] scale allowance".

[58] The Committee stated that Ms AB had not produced any evidence in support of her claim that Mr CD "had not done any preparation" for the hearing and concluded that there was "no evidence" that the services billed in this invoice "were not provided" by Mr CD.

(5) Case management conference, discovery — period 21 January to 30 June 2016

[59] Mr CD's fee, stated in invoice 33, 30 June 2016, was \$10,175 plus GST and disbursements for 18.5 hours legal work which included a case management conference

⁷ The Committee noted that Ms AB had applied to this Office for a review of the Committee's decision on this and other issues concerning Mr CD's conduct when acting for [JJ].

and related attendances, discovery, exploring settlement options, reviewing amended statement of claim and preparing an amended statement of defence.

[60] The Committee was satisfied that there was “no duplication with [Mr CD’s] fees previously charged” in invoice 1444, 23 December 2015, in relation to the amended statement of defence and counterclaim.

(6) Rule 9.1 — fee factors

Importance, results achieved — r 9.1(c)

[61] The Committee referred to the “[p]roportionality between the result and fees charged” being “a feature of a cost benefit analysis for a client”.

[62] In this regard, the Committee noted that Ms AB had informed Mr CD, and the Lawyers Complaints Service after she had lodged her complaint, that “the matter of defending [[JJ]’s] caveat and injunction proceedings” were “of the utmost importance to her”.

Urgency — r 9.1(d)

[63] The Committee noted that “much of the work was urgent and had to be done at short notice”.

Additional matters

[64] The Committee did not include in its decision a consideration of the additional matters referred to in Ms AB’s complaint.

Application for review

[65] Ms AB filed an application for review on 20 November 2018.

[66] She says the Committee “largely ignored [her] main complaint” that Mr CD’s legal work “was not required in the first place”. She says had Mr CD “present[ed] [her] settlement offer” as she instructed him, then “the matter would have ended there and then”.

[67] She asks why she “should ... have to pay anything for work that was not required”. She considers that the fine and costs orders made by the Committee are

inadequate. She repeats that Mr CD, instead of making efforts to settle the dispute, “wanted to generate more work” from her.

[68] Ms AB also repeats the background summary included in her submissions to the Committee and again sets out s 156(1) (orders) of the Act.

[69] She restates that she seeks orders (a) cancelling all of Mr CD’s invoices, including those paid, and outstanding, and (b) compensation for lost profits caused by Mr CD’s “negligence and maliciousness”. She says she had incurred significant legal costs because he did not do so.

(1) Counteroffer, 8 October 2015

[70] Ms AB again says that her main concern is that Mr CD did not, as requested in her 8 October 2015 email to him, submit her counteroffer of \$469,000 to the vendors.

[71] She says Mr CD had not been “compelled” by the Committee “to furnish file notes” in support of his position, yet the Committee stated she “had not provided evidence”.

(2) High Court substantive hearing, 15 November 2016

She repeats her claim that Mr CD invoiced [JJ] for the substantive hearing, yet did not prepare for it.

(3) Additional matters

[72] Ms AB repeats that Mr CD:

- (a) jeopardised prospects of negotiating a settlement because, without her permission, he informed the vendors’ lawyer the dispute was not worth litigating;
- (b) before first informing her, told the vendors’ lawyer he was no longer acting for her; and
- (c) required payment of his outstanding legal fees by 28 January 2018, yet had instructed a debt collector the previous day.

Response

[73] In his response filed in this Office on 5 December 2018, Mr CD states that he has nothing further to add to his submissions made to the Committee.

Review on the papers

[74] 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.

[75] 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

[76] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:⁸

... 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.

[77] More recently, the High Court has described a review by this Office in the following way:⁹

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.

⁸ *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

⁹ *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[78] 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.

Jurisdiction

(1) Person chargeable

[79] Mr CD's clients were [JJ], Ms AB and Ms [EB], to whom he addressed his letter of engagement and for whom he provided his legal services. It is evident from the information provided to this Office, that Ms AB (a) provided instructions to and received Mr CD's advice, and (b) reported to Ms [EB].

[80] For that reason, I consider Ms AB, the complainant, and applicant on this review, qualifies as a "person who is chargeable with a bill of costs" for the purposes of s 132(2) of the Act.

(2) Special circumstances

[81] Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 provides that a Standards Committee's jurisdiction to consider complaints about fees does not extend to bills of costs (a) rendered more than two years prior to the date of the complaint, or (b) where the fees that do not exceed \$2,000.00 exclusive of GST, unless the Standards Committee determines that there are "special circumstances".

[82] The term "special circumstances" was considered by the Court of Appeal in respect of an application to the Court under s 151(1) of the Lawyers Practitioners Act 1982, which provided that (a) a bill of costs could "not be revised by a District Council of its own motion, or referred for revision except by order of a Court"; and (b) the Court could "not make an order for the reference of a bill for revision except in special circumstances".¹⁰

[83] The Court of Appeal considered that "special circumstances" could be present "if the issue is to be related to perceived injustice" in which case "the simple risk of injustice should be sufficient". Alternatively, "it is a question of where the interests of

¹⁰ *Cortez Investments v Olphert and Collins* [1984] 2 NZLR 434 (CA), applied in *AY v YYLCRO* 263/2011 (10 May 2013) at [16]–[17].

justice lie in all the circumstances”; or “[a]ll that can be said is that to be special circumstances must be abnormal, uncommon, or out of the ordinary”.

[84] This Office has adopted the approach that “it is artificial to separate out invoices that relate to essentially a single legal service, and that such invoices are treated as a special circumstance for the purposes of [reg 29]”.¹¹ For that reason, it is appropriate that those of Mr CD’s invoices in which his fees are \$2,000 or less be considered with the other invoices.

[85] The first of Mr CD’s invoices is dated 10 July 2015. As noted earlier, Ms AB’s complaint was lodged with the Lawyers Complaints Service on 28 February 2017, three months before the expiry of the two-year period referred to in reg 29.

Issues

[86] The issue for consideration on this review is whether Mr CD’s fees are fair and reasonable for his legal services provided to Ms AB, [JJ], and Ms [EB] having regard to their interests, and Mr CD’s interests, and having regard to the fee factors in r 9.1? (rr 9, 9.1)

Analysis

(1) Professional rules

[87] Rule 9 prohibits a lawyer from charging a client a fee that is more than fair and reasonable for the legal services provided by the lawyer:

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.

[88] The fee factors, which are contained in r 9.1, “formalise[s] what was considered to be best practice prior to [the Rules]”.¹²

[89] Considerations to be taken into account when determining whether a fee is fair and reasonable include:¹³

¹¹ *AT v ZH* LCRO 127/2013 (26 March 2014) at [62].

¹² See *AQ v ZI* LCRO 105/2010 (11 February 2011) at [75] - referring to as New Zealand Law Society Property Transactions: Practice Guidelines 2003.

¹³ *Hunstanton v Cambourne and Chester* LCRO 167/2009 (10 February 2010) at [22] referring to *Property and Reversionary Investment Corp Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 at 441-442 and *Gallagher v Dobson* [1993] 3 NZLR 611 (HC) at 620. See also *Chean v Kensington Swan* HC Auckland CIV 2006-404-1047, 7 June 2006 at [24], referred to in *AA v BK, BL and BM* LCRO 264/2012 (25 July 2013) at [57].

(a) ... a global approach; (b) what is a reasonable fee may differ between lawyers, but the difference should be “narrow” in most cases; (c) ... time spent ... is not the only factor; (d) It is not appropriate to (as an invariable rule) multiply the figure representing the expense of recorded time spent on the transaction by another figure to reflect other factors.

[90] Because the process of determining a fair and reasonable fee is “an exercise in balanced judgment - not an arithmetical calculation”,¹⁴ one lawyer may reach a “different conclusion[s]” from another lawyer “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”.¹⁵

[91] For that reason, there is a “proper reluctance to ‘tinker’ with bills by adjusting them by small amounts”. It “is therefore appropriate for Standards Committees not to be unduly timid when considering what a fair and reasonable fee is”.¹⁶ Also, “where there is a complaint about a bill of costs there is no presumption or onus either way as to whether the fee was fair and reasonable”.¹⁷

[92] It is only when a fair and reasonable fee has been determined “can it be assessed whether the fee charged is sufficiently close to that amount to properly remain unchanged”.¹⁸ A particular lawyer’s approach to billing may not necessarily “be a relevant consideration in determining whether a fee is fair and reasonable in all of the circumstances”.¹⁹

(b) Parties’ positions

[93] Ms AB claims Mr CD did not, as she says she requested in her 8 October 2015 email to him, submit [JJ]’s counteroffer of \$469,000 to the vendors. As a consequence, she says she, [JJ] and Ms [EB] have incurred significant legal costs because he did not do so. She claims Mr CD billed them for the substantive hearing in November 2016, but was not prepared for it.

[94] In his submissions to the Committee, Mr CD concentrated on his seven invoices in respect of which the assessor considered his fees were not fair and reasonable and recommended reductions. Contrary to the assessor’s recommendation, he submits that those fees were fair and reasonable, and reductions are not warranted.

¹⁴ *Property and Reversionary Investment Corp Ltd v Secretary of State for the Environment* at 441-442

¹⁵ *Hunstanton v Cambourne and Chester*, above n 13. at [62].

¹⁶ At [62].

¹⁷ At [62].

¹⁸ At [11].

¹⁹ At [15].

(c) Discussion

[95] Mr CD set his fees by multiplying his hourly rate of \$550 by his hours worked. GST and disbursements were added to that result. The remaining three invoices relate to disbursements (High Court filing fees).

[96] As noted earlier, the assessor considered that Mr CD's fees in seven (out of ten) invoices were not fair and reasonable, and recommended a total reduction of \$12,187.50 from the overall total of \$60,325, to \$48,137.50 plus GST and disbursements — a difference of 20 per cent.

*(1) Seven invoices — not considered fair and reasonable by the assessor**(a) Invoice 1397, 31 July 2015 — period 15 – 31 July 2015*

[97] The fee component for this invoice is \$1,750 for 3.18 hours legal work.

[98] This included correspondence with the High Court and vendors' counsel to arrange a defended hearing date in respect of the vendors' application to remove [JJ]'s caveat, legal research and related attendances concerning tender of settlement, reviewing and advising Ms AB concerning the vendors' affidavit in reply.

[99] Although the assessor did not consider the 3.18 hours billed was unreasonable, she recommended a reduction of \$100 to \$1,650 plus GST and disbursements.

[100] Those of the fee factors in r 9.1 in respect of which a weighting could reasonably be expected for this fee include Mr CD's time and labour expended (r 9.1(a)), the importance of the matter to [JJ] (rule 9.1(c)), the urgency required (r 9.1(d)) and Mr CD's experience (r 9.1(g)). I consider that weightings for those factors would be incorporated in Mr CD's hourly rate of \$550, which compares not unfavourably with the range of charge out rates for barristers referred to in a 2010 survey.²⁰

[101] Taking into account the small reduction recommended, in my view an adjustment to Mr CD's fee in this invoice is not warranted.

(b) Invoice 1412, 31 August 2015 — period 1 – 31 August 2015

[102] The fee component for this invoice is also \$1,750 for 3.18 hours legal work.

²⁰ Richard Burcher "Pricing barristers' services" (2010) LawTalk, 753 at 12 — "\$250 plus GST per hour with 10 years' experience and about \$500 per hour plus GST with 40 years' experience. (...there [are] a number of very senior members of the independent bar was charge out rates of \$1000 plus GST or more per hour)".

[103] Mr CD's legal work included attendances concerning the tender of settlement (by Mr GH), correspondence with the High Court and the vendors' counsel to arrange a hearing date for the vendors' application to remove [JJ]'s caveat, and communications (telephone, correspondence) with Ms AB.

[104] The assessor considered that much of this work, being administrative in nature, could have been delegated to Ms OP. It was not clear to the assessor whether any of Ms OP's time for research had been included. For those reasons the assessor recommended a reduction of 1.18 hours, \$650, to \$1,100 plus GST and disbursements.

[105] Mr CD says this invoice included his work concerning tender of settlement, advice concerning a without prejudice settlement, preparation of a joint memorandum of counsel concerning adjournment of the fixture and reviewing Court minutes. He says he did not bill for "administration matters such as payment of fees".

[106] Although there appears to have been no particular urgency for these attendances, weightings could be reasonably expected in respect of Mr CD's time and labour expended (r 9.1(a)), the importance to [JJ] to achieve an early settlement (r 9.1(c)) and Mr CD's experience (r 9.1(g)). Again, I consider that weightings for those factors would be incorporated in Mr CD's hourly rate.

[107] Taking into account the modest reduction recommended, on balance it is my view that the fee in this invoice falls within an acceptable range.

(c) Invoice 1444, 23 December 2015 — period 1 October 2015 – 23 December 2015

[108] The fee component for this invoice is \$14,500 for 26.36 hours legal work.

[109] The legal work for this invoice related to Mr CD's attendances in the lead up to and following the High Court hearing on [Date] 2015 in respect of the vendors' application to remove [JJ]'s caveat. These attendances included preparation for the hearing, appearance at court, and post hearing attendances including preparing, filing and serving a statement of defence and counterclaim, and applying for specific performance.

[110] I observe that the narration of attendances in this invoice makes no reference to Ms AB's 8 October 2015 counteroffer.

[111] The assessor considered that (a) because of previous work carried out, Mr CD's time drafting documents would have been shortened and (b) Ms OP could have carried out some of the preparatory work at a lower cost. The assessor recommended a

reduction of 4.36 hours (to 22 hours), \$2,400, to a fee of \$12,100 plus GST and disbursements.

[112] Mr CD challenges that view. He refers to the “Time allocations” for “General civil proceedings” in sch 3 of the HCR,²¹ which he says allows (a) 1.6 days for preparation of a counterclaim, (b) two days for preparation of submissions, and appearance at the hearing, a total of 3.6 days which, at eight hours per day, results in 28.8 hours legal work.

[113] He submits the HCR “deem reasonable” 2.44 hours more than he billed for that particular work. He says taking into account that his invoice also related to the additional attendances he describes in the invoice, then his fee is fair and reasonable.

[114] Although the Committee accepted that by applying sch 3, it would have been permissible for Mr CD to charge a higher fee, I make the observation that sch 3 is not included as one of the factors in r 9.1 to be taken into account when determining a fair and reasonable fee. As explained in “Going to Court” published by the Ministry of Justice, the Court may award a successful litigant costs calculated in accordance with schs 2 or 3 of the HCR.²²

[115] Whilst sch 3, which specifies the time that a lawyer who acts for the successful litigant can claim, may serve as a reference point, a lawyer’s fee must nonetheless be determined in accordance with chapter 9 of the Rules, including rr 9 and 9.1.

[116] In my view, those of the fee factors in r 9.1 in respect of which a weighting would be reasonable for the attendances on this invoice include Mr CD’s time and labour expended (r 9.1(a)), the importance to [JJ] to sustain its caveat (r 9.1(c)), and Mr CD’s experience (r 9.1(g)). These weightings would be incorporated in Mr CD’s hourly rate.

[117] Again, overall, I consider that a reduction of Mr CD’s fee on this invoice is not necessary.

(d) Invoice 33, 30 June 2016 — period 21 January 2016 – 30 June 2016

[118] The fee component for this invoice is \$10,175 for 18.5 hours legal work.

[119] The legal work included the first case management conference, discovery, exploring settlement possibilities (4 and 9 May 2016), attending the first case

²¹ See also High Court Rules 2016, r 1.45 — determination of reasonable time.

²² Ministry of Justice “Going to court” (18 May 2018) <www.justice.govt.nz>. Schedule 2 states how much can be claimed for legal fees in respect of each day in Court.

management conference (11 May 2016), and related attendances reviewing amended statement of claim, preparing and filing amended statement of defence.

[120] Mr CD initially, and as he acknowledges, “incorrectly”, informed the assessor that his 23 December 2015 invoice (invoice 1444), included his work on the “amended statement of claim”. For that reason, and to avoid double up, the assessor recommended a reduction of 6.5 hours, \$3,575, to a fee of \$6,600 plus GST and disbursements.

[121] Mr CD points out that his invoice 1444 concerned his legal work in respect of the “original” statement of claim, not the “amended statement of claim”. For that reason, he says there was no double up.

[122] He says his allowance of 3.5 hours for the amended statement of claim and counterclaim is less than 4.8 hours (0.6 of a day) allocated in sch 3. He submits that his allowance of one hour for reporting to Ms AB following the case management conference, 30 minutes for incidental attendances and 2.5 hours for discovery, which was undertaken by Ms OP, was not “excessive”.

[123] I consider that those of the fee factors in r 9.1 in respect of which a weighting would be applicable for the attendances on this invoice again include Mr CD’s time and labour expended (r 9.1(a)), the importance to [JJ] in achieving a settlement at that stage (r 9.1(c)) and Mr CD’s experience (r 9.1(g)). These weightings would be incorporated in Mr CD’s hourly rate.

[124] In view of the fact there appears to have been no double up in invoice 1444 concerning the amended statement of claim, I do not consider a reduction is necessary.

(e) Invoice 61, 21 September 2016 — period 1 July 2016 – 30 September 2016

[125] The fee component for this invoice is \$3,150 for 5.73 hours legal work.

[126] Mr CD’s legal work to which this invoice relates concerned his attendances in respect of pre-trial directions, attempting to arrange mediation and reviewing the vendors’ witness statement.

[127] The assessor recommended a reduction to 3.75 hours (a difference of 1.98 hours), \$1,089, to a fee of \$2,062.50.

[128] Mr CD says this invoice includes 51 emails relating to “the progress of the case”, which included his “attempts to arrange a mediation” in September 2016 prior to the substantive hearing scheduled for 15 November 2016.

[129] The fee factors in r 9.1 in respect of which a weighting could be expected for the attendances on this invoice include Mr CD's time and labour expended (r 9.1(a)), the importance to [JJ] in achieving a settlement (r 9.1(c)) and Mr CD's experience (r 9.1(g)). Again, these weightings would be incorporated in Mr CD's hourly rate.

[130] In my view, Mr CD's fee on this invoice falls within an acceptable range, and for that reason a reduction is not warranted.

(f) Invoice 68, 7 November 2016 — period 21 September 2016 – 7 November 2016

[131] The fee component for this invoice is \$5,500 representing 10 hours legal work.

[132] Mr CD's legal work included prehearing attendances, receiving the vendors' witness statement, preparing Ms [EB]'s witness statement, reviewing the vendors' witness statement in reply, correspondence and discussions concerning settlement of the dispute.

[133] The assessor recommended a reduction of one to two hours, \$1,060 (1.9 hours), to \$4,440 plus GST and disbursements.

[134] Mr CD disagrees with the assessor's view that (a) eight or nine hours was reasonable for this work, and (b) the witness statement work could have been attended to by a junior barrister "at the reduced rates". He says because the billing period for this invoice was more than seven weeks, his allowance of one hour for "incidental attendances" is reasonable.

[135] As with the previous invoices, I consider that the fee factors in r 9.1 which are applicable to these attendances include Mr CD's time and labour expended (r 9.1(a)), the importance to [JJ] in having the matter resolved either by settlement, or a successful outcome of the substantive hearing (r 9.1(c)), and Mr CD's experience (r 9.1(g)). These weightings would be incorporated in Mr CD's hourly rate.

[136] The reduction recommended by the assessor was either one or two hours. Mr CD's attendances included in this invoice, were provided at a crucial time when it was important for [JJ] to either settle or obtain the best successful outcome from the substantive hearing. Taking into account these considerations, in my view a fee reduction is not warranted.

(g) Invoice 78, 5 December 2016 — period 8 to 30 November 2016

[137] The fee component for this invoice is \$12,500 for 22.7 hours legal work.

[138] Mr CD's attendances include preparation for the High Court hearing on the substantive issues, reviewing the vendors' opening submissions, chronology and evidence, appearing at Court on 9 and 15 November 2016, settlement negotiations and completion of the settlement agreement.

[139] The assessor recommended a reduction of (approximately) 6.1 hours, \$3,315, to \$9,185. In the assessor's view, five to eight hours was the range of time required for the preparation work.

[140] Mr CD submits that the hearing "was a combination of 17 months of litigation", in respect of which three days had been allowed to hear the matter. He again refers to sch 3, which he says allows for five days (two days preparation and three days hearing), which equates to 40 hours (fee \$22,000). He says his allowance of 11 hours for preparation is "25 [per cent] of the [sch 3] allowance".

[141] The Committee similarly referred to the assessor not having taken sch 3 into account and considered Mr CD's legal work carried out, and billed, was "within a permissible range for this type of work".

[142] I consider that those of the fee factors in r 9.1 applicable to these attendances include Mr CD's time and labour expended (r 9.1(a)), the importance to [JJ] in having the matter resolved either by settlement, or a successful outcome of the substantive hearing (r 9.1(c)), urgency with respect to settlement negotiations which took place during the four days (including a weekend) before, and on the first day of the hearing (r 9.1(d)), and Mr CD's experience (r 9.1(g)). Again, these weightings would be incorporated in Mr CD's hourly rate.

[143] For these reasons I consider a fee reduction for Mr CD's fee in this invoice is not warranted.

(2) Remaining three invoices

(a) Invoice 1383, 14 July 2015 — period 8– 14 July 2015

[144] The fee component for this invoice is \$9,100, which represents 16.5 hours legal work.

[145] Mr CD's attendances for this invoice included receiving Ms AB's urgent instructions to prepare notices of opposition and supporting affidavits in response to the vendors application to remove [JJ]'s caveat, and injunction proceedings, appearance at the High Court on 13–14 July 2015, and related attendances.

[146] The assessor considered that, “by a narrow margin”, Mr CD’s fee in this invoice is fair and reasonable. I agree with that assessment.

[147] I consider that the fee factors relevant to this invoice include Mr CD’s time and labour expended (r 9.1(a)), the importance to [JJ] in responding to the vendors’ applications to remove the caveat, and injunction (r 9.1(c)), required urgency on those attendances (r 9.1(d)) and Mr CD’s experience (r 9.1(g)). Again, these weightings would be incorporated in Mr CD’s hourly rate.

(b) Invoice 1425, 30 September 2015 — period 1 – 30 September 2015

[148] The fee component for this invoice is \$550, which represents one hour of legal work. The attendances relate to reviewing a High Court minute, discussions with and advising Mr GH concerning tender of settlement and a settlement notice.

[149] No reduction was recommended by the assessor. I agree with that assessment.

(c) Invoice 88, 23 December 2016 — period 1 – 23 December 2016

[150] The fee component for this invoice is \$1,350, which represents 2.4 hours legal work. These attendances, which follow settlement of the dispute on 15 November 2016, the first day of the High Court hearing of the substantive issues, include correspondence and telephone conversations with the vendors’ counsel in respect of proposals to sell the property, and reporting to Ms AB.

[151] No reduction was recommended by the assessor. I agree with that assessment.

(3) Conclusion

[152] Having regard to the fee factors I have referred to in respect of which I consider a particular weighting is appropriate, overall, I consider Mr CD’s fees fall within an acceptable range that is fair and reasonable for this particular type of litigation work.

[153] I have carefully considered each invoice and related information provided to this Office. I am grateful to the assessor for her report, which was of considerable assistance.

[154] In reaching my conclusion that a reduction in Mr CD’s fees is not warranted, I make the observation that the total of reductions recommended by the assessor in respect of invoices 1397 (\$100), 1412 (\$650), 1444 (\$2,400), 61 (\$1,089), 68 (\$1,060) and 78 (\$3,315) is \$8,614, which represents 14.2 per cent of the total of \$60,325 invoiced by Mr CD.

[155] This does not include Mr CD's invoice 33, in respect of which the assessor recommended a reduction of six hours, \$3575, based on Mr CD having "incorrectly" informed the assessor that his work on the amended statement of claim had been billed in invoice 1444.

(4) Ms OP's fees

[156] As noted earlier, Mr CD informed [JJ], Ms AB and Ms [EB] in his letter of engagement that "[i]n order to keep costs to a minimum and/or to progress work within the timeframes required [he] may engage the services of a junior barrister" whose "usual hourly rate" is \$125 plus GST. He explained that the junior barrister's work would not be charged separately, but "included within [his] fee".

[157] Ms OP's two invoices, which she issued to Mr CD, were not incorporated in his invoices. As he explained to the assessor, he "forwarded" both invoices to [JJ] for payment.

[158] The Committee did not include consideration of Ms OP's fees in its decision.

Discussion

[159] In my view because the Committee did not consider Ms OP's fees, it is appropriate that I return this matter to the Committee to do so.

Decision

(1) Mr CD's fees

[160] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Committee to take no further action in respect of Ms AB's complaint about Mr CD's fees is confirmed.

[161] In reaching my decision, I make the observation that on current matters of practice such as this, it is important to note that Standards Committees are made up of practising lawyers, familiar with the practice of law, including the conduct of litigation in the courts, as well as lawyers' duties and obligations, and the time pressures and constraints under which lawyers often find themselves. Standards Committees must also include a lay member. This format allows for a range of views — legal and non-legal — to be considered. The process is flexible and robust.

(2) Ms OP's fees

[162] Pursuant to s 209(1)(a) of the Act, the Committee is directed to reconsider and determine Ms AB's complaint insofar as it relates to Ms OP's fees,

(3) Mr CD — other conduct allegations

[163] Because the Committee did not include in its decision a consideration of the additional matters referred to in Ms AB's complaint, and repeated in her application for review, pursuant to s 209(1)(a) of the Act, the Committee is directed to reconsider and determine Ms AB's complaints that Mr CD:

- (a) without her permission, had informed the vendors' lawyer the dispute was not worth litigating;
- (b) without first informing her, had informed the vendors' lawyer he was no longer acting for her; and
- (c) had instructed a debt collector a day before the date he had set for payment of his outstanding legal fees.

Anonymised publication

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

DATED this 3rd day of July 2019

B A Galloway
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:

Ms R AB, as the Applicant
Mr M CD, as the Respondent
[Area] Standards Committee
New Zealand Law Society