LCRO 005/2018

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	**ZZ** Applicant
AND	**XX AND WW LAWYERS** Respondent

DECISION

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

Introduction

[1] Mr ZZ has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of his complaint concerning the conduct of the respondent, Ms XX and WW Lawyers (herein called "the lawyers", unless separate reference is appropriate).

Background

[2] Mr ZZ was proposing to purchase a [ABC] business. He approached Ms XX for legal advice. At the time Ms XX took instructions, she was an associate in the firm. By the time Mr ZZ had taken steps to file his complaint, Ms XX had become a director of the firm.

[3] Mr ZZ instructed the lawyers in his personal capacity. [WW]s' letter of engagement dated 3 November 2015 was addressed to him personally.

[4] It was Mr ZZ's intention to incorporate a company. It was proposed that his business would trade under the company name.

[5] He subsequently incorporated a company, [Town ABC] Limited (Town ABCL). The business purchase was completed in the name of the company.

[6] The sale and purchase agreement for the business included a provision that the lawyers had to provide an undertaking to the franchisor stating:

> To the best of our knowledge there are no pending or threatened actions or proceedings affecting the franchisee or the guarantors before any Court or other body, which may materially adversely affect the financial condition or operation of the franchisee or the guarantors or materially impede their ability to perform their obligations under the franchise agreement or the securities.

[7] At the time the purchase negotiations were progressing, Mr ZZ had an assault charge before the court which was awaiting a hearing.

[8] The question as to whether details of this pending charge had to be disclosed to the franchisor became a matter of contention between Mr ZZ and the lawyers.

[9] The transaction was due to settle on Friday 29 January 2016.

[10] The total funds required for settlement could not be accessed. Arrangements were made to effect a partial settlement which allowed opportunity for Mr ZZ to take possession of the business.

[11] The following week, settlement was finalised, through the drawdown of funds to complete the purchase.

[12] The lawyers' fees were paid by deduction from funds held.

[13] Mr ZZ expressed concern at the decision to deduct fees in this manner. It was his view that the lawyers had no authority to do so. Ms XX explained to Mr ZZ that the letter of engagement recorded that fees may be deducted from funds held.

[14] An agreement was reached that Mr ZZ would be refunded $12,000 of the fee that had been drawn from his account. The parties disagree as to the basis of the agreement reached to refund a portion of the fees deducted to Mr ZZ. The lawyers are emphatic that they had only agreed to release the fees on the understanding that Mr ZZ had undertaken to repay the fees within a specified timeframe. The lawyers say they were prepared to allow this indulgence to Mr ZZ because Mr ZZ had told them he had cash flow problems and needed the funds to get his business started.

[15] The fees that had been deducted were not repaid in the time frame required by the lawyers.

[16] Mr ZZ asked the lawyers to provide clarification as to how his account had been calculated. Inference could reasonably be drawn from that inquiry that he was unhappy with the fee that had been charged.

[17] The lawyers took steps to recover the debt, including sending a draft statutory demand to [ABC Town] and to the company's majority shareholder.

[18] Mr ZZ lodged a complaint with the New Zealand Law Society Complaints Service (NZLS).

[19] After the complaint had been filed, the lawyers continued with their attempts to recover the debt.

[20] When Mr ZZ advised NZLS that the lawyers were proceeding with recovery action despite him having lodged his complaint, NZLS advised the lawyers of the prohibition on lawyers from either commencing or continuing with steps to recover an outstanding fee, when a complaint has been made about a fee.[1]

[21] On being alerted to this, the lawyers ceased recovery action and apologised to Mr ZZ.

The complaint and the Standards Committee decision

[22] Mr ZZ lodged a complaint with NZLS on 17 October 2016. The substance of Mr ZZ's complaint (in part expressed in his own words) was that the lawyers:

(a) "helped themselves" to settlement funds when "they had no right to do so", this in essence amounting to "theft";

(b) breached his confidentiality in relation to the assault charge matter;

(c) failed to keep a record of time taken on his legal work;

(d) charged a success fee, described by him as a "charlatan fee" to which they were not entitled;

[1] Lawyers and Conveyancers Act 2006, s 161.

(e) sent a threatening letter to the shareholder of [ABC TOWN] and in doing so had "scandalised" his good name; and

(f) were at all times acting for him in a personal capacity, hence the enforcement steps taken against [ABC TOWN] were unprofessional.

[23] In responding to Mr ZZ's complaint the lawyers submitted that:

(a) Mr ZZ was a new client of the firm and they had provided him with a letter of engagement. He entered into the agreement for sale and purchase of the supermarket in his personal capacity, but it was always his intention to incorporate [ABC TOWN] and nominate that entity as the purchaser;

(b) they had not sent a new letter of engagement to [ABC TOWN] once that company was incorporated;

(c) Mr ZZ was the sole director of [ABC TOWN] and already had full knowledge of their terms and conditions;

(d) the first agreement for sale and purchase was cancelled after the vendor refused Mr ZZ an extension he had requested in order to satisfy conditions in the agreement;

(e) the agreement was then renegotiated with [ABC TOWN] as the purchaser, and in the circumstances it was not considered necessary to create a "new file";

(f) due to the settlement timeframe in the agreement, the lawyers were required to complete a significant amount of work on an urgent basis;

(g) the assault charge Mr ZZ was facing, could, in the event of adverse outcome, have had potential to negatively impact Mr ZZ's business;

(h) Mr ZZ's privacy had not been breached;

(i) the disclosure clause was completed and provided to the franchisee on Mr ZZ's instructions;

(j) the basis on which fees had been deducted, and the authority to do so, was explained to Mr ZZ;

(k) settlement was unable to proceed on 29 January 2016, as Mr ZZ had been unable to finalise insurance details;

(l) Mr ZZ paid $750,000 into the lawyers' trust account and this was receipted in his personal name and then transferred to a ledger in the name of [ABC TOWN], as a shareholder advance;

(m) partial settlement took place, with a subsequent drawdown of loan funds, and the deduction of fees from those funds;

(n) when Mr ZZ advised he was unhappy with this deduction the lawyers agreed to refund $12,000 on the basis that Mr ZZ would pay their fees by 20 February 2016;

(o) the lawyers attended to the usual settlement "washup" tasks;

(p) Mr ZZ did not pay the account by 20 February 2016;

(q) Mr ZZ was provided with an itemised account as he had asked for (they acknowledge some inadvertent delay in providing this);

(r) neither Mr ZZ nor anyone acting on his behalf responded to their further attempts to communicate about the debt, and their indication that enforcement steps would be taken;

(s) on 12 October 2016, the lawyers sent a draft statement of demand to Mr ZZ and to [ABC TOWN]'s other shareholder but no response was received; (Mr ZZ's complaint to NZLS is dated 17 October 2016);

(t) the statutory demand was finalised and served on 21 November 2016;

(u) some of the work was made more complex and urgent by Mr ZZ's own delay or failure to attend appointments; and

(v) Mr ZZ had received competent and professional service for which he was charged a reasonable fee.

[24] The Committee distilled the following issues from the complaint:

(a) Was it appropriate for the lawyers to invoice [ABC TOWN]?

(b) Had the lawyers contravened r 3.4 of the Lawyers and Conveyancers Act (Lawyers Conduct and Client Care) Rules 2008 (the Rules) in failing to provide [ABC TOWN] with a letter of engagement?

(c) Were the lawyers' fees fair and reasonable?

(d) Did the lawyers have authority to deduct fees from money held on behalf of [ABC TOWN]?

(e) Had the lawyers used legal processes for an improper purpose in breach of r 2.3 of the Rules?

(f) Had the lawyers breached r 8 of the Rules (confidentiality) in relation to the solicitor's certificate [undertaking] that was provided to the vendor?

[25] The Committee delivered its decision on 16 November 2017 and determined, pursuant to s 152(2)(c) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

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

(a) the work undertaken was ultimately for the benefit of [ABC TOWN] and it was appropriate for the company to have been invoiced;

(b) while there had been a technical breach of r 3.4 of the Rules (information provided in advance), not every breach requires a disciplinary sanction;

(c) the lawyers' fees were fair and reasonable;

(d) authority to deduct fees was specifically referred to in the letter of engagement;

(e) sending a letter to a shareholder reflected an aggressive approach to debt collection and was not best practice, however this did not amount to using legal processes for an improper purpose; and

(f) the lawyers acted appropriately in relation to the undertaking issue to ensure they were not breaching their professional obligations;

Application for review

[27] Mr ZZ filed an application for review on 27 December 2017. He submits that.

(a) the lawyers had breached confidentiality and taken an overly cautious response to the undertaking;

(b) the purpose of the undertaking requested was to allay concerns about potential financial risks. His criminal charge did not properly raise issue of his financial stability;

(c) he had made request of Ms XX to recommend a criminal lawyer. The moment he raised the issue Ms XX should have either (a) recused herself from acting or (b) anticipated potential difficulties and shut the conversation down before opportunity for potential prejudice arose;

(d) the lawyers were naive and lacked business acumen;

(e) the Committee ignored r 2.3 of the Rules;

(f) the Committee's determination was seriously flawed;

(g) the shareholder and his wife were "scared witless" when they opened the letter of demand; and

(h) the lawyers had "besmirched his impeccable reputation" by naively advising the franchisor of something they should not have disclosed in the first place.

[28] The outcomes Mr ZZ seeks are:

(a) compensation for distress and humiliation in the range of $5,000–$10,000;

(b) confirmation that no further payment is owed to the lawyers;

(c) a letter of apology to be sent to the shareholder and his wife with an ex gratia payment of compensation of "at least $1,000 each for the fear and humiliation to both these innocent parties";

(d) the Committee's decision be overturned and his complaint to be upheld in a "substantive and meaningful" manner; and

(e) "Sanctions with bite" be imposed.

[29] In summarising his position, Mr ZZ submitted that a failure to sanction the lawyers' conduct would compromise the integrity of the disciplinary process. In Mr ZZ's words, it would make the disciplinary process "a joke".

[30] In responding to the review application, the lawyers advised that they placed reliance on the earlier submissions filed.

The hearing

[31] The parties attended a hearing in Hamilton on 28 August 2018.

[32] Ms XX appeared as did Mr UU, a director of the firm.

[33] At the conclusion of the hearing I summarised for the parties the arguments they had advanced at hearing, and sought confirmation from both that the summary provided presented as an accurate and complete account of their respective positions.

Nature and scope of review

[34] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[2]

> … 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.

[35] More recently, the High Court has described a review by this Office in the following way:[3]

> 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

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

> 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.

[36] 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

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

(a) Do any conduct issues arise from the lawyers failing to provide Mr ZZ with a fresh letter of engagement when they commenced acting for the company?

(b) Do any conduct issues arise from the lawyer's taking steps to enforce the debt when a complaint was on foot?

(c) Did the lawyers use legal process for an improper purpose when they provided a company shareholder with a draft of the statutory demand?

(d) Do any conduct issues arise from the actions of the lawyers' service agent serving a notice of statutory demand on a member of Mr ZZ's staff?

(e) Did the lawyers breach their obligation to ensure that Mr ZZ's business was kept confidential?

(f) Were the fees charged fair and reasonable?

[38] Before addressing each of the specific issues, I record that after hearing from Mr ZZ, it became clear that the two issues of most concern to him were complaint that his confidentiality had been breached, and complaint that fees charged were not fair and reasonable.

Do any conduct issues arise from the lawyers failing to provide Mr ZZ with a fresh letter of engagement when they commenced acting for the company?

[39] No. The progression from dealing with Mr ZZ in his personal capacity to dealing with his company was an entirely natural one and one that was clearly contemplated by the parties at the commencement of the retainer.

[40] When Ms XX first took instructions, the company was not incorporated. There was no proper legal basis for opening a file in the name of the company when there was no company in existence. But it is readily apparent that adopting what is a conventional approach in circumstances such as these, the business was transacted in the name of the company once the company had come into existence.

[41] Whilst Mr ZZ advances argument that the company should have been provided with a fresh letter of engagement, I did not form a view that this argument was being advanced by him in anything other than a technical sense. He could identify no prejudice to him and indeed there was none. It was not contested by Mr ZZ that he had expectation that his fees would be rendered to the company (indeed his accountant had made specific request of the lawyers for that to be done) and it would reasonably be expected that Mr ZZ would have been wanting to avail himself of the tax and GST benefits that would flow from his fees being rendered to the company.

[42] There was no sense in which the work completed by the lawyers could be classified as falling into two camps, personal and business, and it would present as an obvious artifice to attempt to do so. Despite the fact that there were two agreements, this was a single, seamless transaction involving a business purchase.

[43] It would have been preferable if the lawyers had provided a separate letter of engagement to the company, but their failure to do so, does not amount to conduct which would reach the threshold to engage a consideration of need for a disciplinary response.

Do any conduct issues arise from the lawyers taking steps to enforce the debt when a complaint was on foot?

[44] No. The lawyers were in error when they continued to take steps to enforce the debt after Mr ZZ had filed his complaint. On being alerted to the problem, the lawyers immediately put the enforcement proceedings on hold and proffered apology to Mr ZZ. It was an oversight promptly rectified.

[45] I accept the lawyer's submission that they had, on first receiving the complaint, perceived the complaint as being not about the fee charged, but rather about their actions in deducting fees from funds held.

[46] There is correspondence from the Complaints Service and the lawyers which indicates that the lawyers were initially unaware that a complaint about the quantum of their fees had been made.

[47] It has been said that rules must be interpreted fairly and sensibly.[4]

[48] Considering this aspect of complaint in its context, I am not persuaded that a disciplinary response is required.

Did the lawyers use legal process for an improper purpose when they provided a company shareholder with a draft of the statutory demand?

[49] No. I agree with the Committee that it was not best practice to forward the letter of demand to the [ABC TOWN] shareholder, but the conduct does not meet the threshold to merit consideration of the imposition of a disciplinary sanction.

[50] Mr ZZ explained that the company's majority shareholder was his family trust.

[51] Mr ZZ submits that the shareholder engaged was traumatised when the letter of demand was received. He seeks financial compensation for the distress said to have been suffered by both the shareholder and the shareholder's wife.

[52] Mr ZZ provides no evidence of the distress purportedly suffered, or evidence to support his claim for compensation.

[53] I accept that the shareholder may have been disconcerted on receiving the demand, but do not consider that the lawyers knowingly used legal process for deliberate purpose of causing embarrassment, distress or inconvenience to another person's reputation, interest, or occupation.

Do any conduct issues arise from the actions of the lawyers' service agent in serving a notice of statutory demand on a member of Mr ZZ's staff?

[54] No. The demand was served at the company's registered office. The lawyers contend that their service agent had formed a view that Mr ZZ was being evasive and

[4] [Case citation removed]

taking deliberate steps to avoid being served. I make no comment on that, but I am unaware of any statutory provision or conduct rule which prohibits service of a document on an employee in circumstances where the employee is served with a document at a company's registered office.

Did the lawyers breach their obligation to ensure that Mr ZZ's business was kept confidential?

[55] No.

[56] The sale and purchase agreement required the lawyers to provide the undertaking recorded at [6] above.

[57] It is a serious matter for a lawyer to provide an undertaking.

[58] Rule 10.3 of the Rules provides that a lawyer must honour all undertakings, whether written or oral, that he or she gives to any person in the course of practice.

[59] The Courts have an inherent jurisdiction in respect of the conduct of lawyers who are officers of the Court.[5] Because undertakings are held out by the legal profession "as having an elevated and special status, it is necessary for the profession to scrupulously honour them".[6]

[60] In insisting that Mr ZZ either (a) disclose that he had been charged with a criminal offence or (b) remove the clause requiring an undertaking from the agreement, Mr ZZ submits that he was forced into a position where he had to disclose that he was facing a criminal charge. He puts it as high as to suggest that he was "blackmailed" into making disclosure.

[61] Mr ZZ advances two arguments to support his contention that the lawyers breached confidentiality.

[62] Firstly, he submits that when he first disclosed to Ms XX that he was facing a criminal charge, Ms XX should immediately on having the issue raised, identified potential commercial concerns and insisted that Mr ZZ not tell her anything further

---

[5] Duncan Webb, Kathryn Dalziel, Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 410.
[6] *Auckland Standards Committee 3 of New Zealand Law Society v W* [2011] 3 NZLR 117 (HC) at [67].

about the criminal charge. In blunt terms, Mr ZZ suggests that Ms XX had an obligation to "shut him down".

[63] There is disagreement as to the circumstances which preceded Mr ZZ's disclosure. Mr ZZ says that he raised the matter with Ms XX to inquire if she could recommend a lawyer who could represent him on the criminal matter.

[64] Ms XX emphatically rejects suggestion that she was asked to recommend a lawyer. She says that Mr ZZ raised the issue unprompted and that when doing so, he informed her that he had already engaged a lawyer to represent him.

[65] I am unable to resolve the differences in recollection, but in any event, little turns on the matter. What is clear is that Mr ZZ raised the issue with Ms XX. It is also clear that he did so before Ms XX had received the sale and purchase documentation.

[66] I reject argument that Ms XX could, and should, have reacted to Mr ZZ's disclosure with such immediate and prescient awareness as to the potential problems that could arise from her knowing what Mr ZZ had told her. This was a cat that was immediately out of the bag from the moment the bag was opened. It presents as simply unrealistic that Ms XX could have been expected to respond in the manner suggested by Mr ZZ.

[67] Nor would it have been sensible for her to have done so. The information that Mr ZZ was disclosing was important. It was information which could potentially have consequences for the commercial transaction. It would have been remiss of Ms XX to have shut Mr ZZ down, and unwise for her to have attempted to do so.

[68] Secondly, Mr ZZ submits that the undertaking sought did not require him to disclose his criminal charge. He argues that the undertaking only required disclosure of any financial matters that could potentially affect the franchisee.

[69] Mr ZZ's view of the scope of the undertaking is unduly restrictive.

[70] The undertaking requires a disclosure of any "pending actions or proceedings affecting the franchisee or the guarantors before any court or other body". There is no dispute that Mr ZZ was facing proceedings before a court.

[71] The undertaking required disclosure as to whether those proceedings could:

> materially adversely affect the financial condition or operation of the franchisee or the guarantors or materially impede their ability to perform their obligations under the franchise agreement or the securities.

[72] Ms XX was concerned that an adverse outcome for Mr ZZ in the criminal jurisdiction could potentially impact his ability to operate the business. She prudently sought advice from one of the firm's directors who specialised in criminal law. He was familiar with possible outcomes that would flow from a criminal conviction. He too considered that it would be unwise to provide the undertaking without disclosure of the criminal charge.

[73] Options were recommended to Mr ZZ, including suggestion that the undertaking be removed from the agreement. Mr ZZ was not enamoured with that suggestion. He was apprehensive that removing the clause would the make the franchisor nervous and potentially threaten the purchase.

[74] His instructions were to provide the undertaking but in a modified form. Mr ZZ himself amended the undertaking and instructed the lawyers to provide the undertaking in its amended form.

[75] The amendment drafted by Mr ZZ disclosed that Mr ZZ was facing a criminal charge, but did more than simply disclose that Mr ZZ had been charged with a criminal offence. It would be a fair summation of the modified undertaking to say that it expressed Mr ZZ's view that the charge was innocuous, that there was nothing in it.

[76] The transaction settled. Clearly the franchisor was not discomforted by the modified undertaking provided.

[77] There can be no suggestion that the lawyers breached confidentiality. Information pertaining to Mr ZZ's charge was disclosed on the specific instructions of Mr ZZ to do so. A lawyer may disclose confidential information relating to the business or affairs of a client to a third party where the client expressly or impliedly authorises the disclosure.[7]

[78] Argument that Mr ZZ was manipulated into providing the undertaking is unconvincing. It would have been remiss of the lawyers not to address the issue head on.

Were the fees charged fair and reasonable?

[79] Mr ZZ has a number of concerns regarding his fees.

---

[7] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 8.4(a)

[80] I propose to deal with this cluster of related issues, under the umbrella of the underpinning inquiry as to whether the fee charged was fair and reasonable.

[81] Mr ZZ submits that the lawyers had no authority to deduct fees from funds held.

[82] Whilst he contends that he raised his concerns about the amount of the fee with Ms XX immediately on being provided with his account, I am not persuaded that was the case.

[83] Ms XX says that Mr ZZ raised no objection to the quantum of the fee when presented with his account, but rather that his objection at that time was focussed solely on concern that fees had been deducted without his authority.

[84] I accept Ms XX's evidence. There is no evidence to support suggestion that the lawyers agreed to refund funds that had been deducted on the basis that Mr ZZ had challenged the amount of the fee.

[85] There is however, evidence to support the lawyer's position that they agreed to release funds on the basis of an understanding that Mr ZZ would settle his account in full by an agreed date.

[86] In correspondence to Mr ZZ of 31 March 2016, Ms XX makes request of Mr ZZ to pay the outstanding costs. In that correspondence, she refers to the agreement that Mr ZZ would settle his account by 20 February 2016 and confirmed that funds were released to him on the basis of his assurance that the fees would be paid by the agreed date.

[87] There is no evidence that Mr ZZ responded to Ms XX and challenged her recollection of the agreement that had been reached.

[88] On 4 April 2016, Ms XX wrote to Mr ZZ in similar vein, noting that "[t]he basis on which we let you defer the payment of part of your costs was that you would pay in full by 26 February".

[89] Shortly after receiving the account, Mr ZZ made request of the lawyers to provide him with an itemised account. This would have alerted the lawyers to the fact that Mr ZZ had concerns about his account.

[90] There appears to have been some delay in responding to Mr ZZ's request.

[91] When information was provided to Mr ZZ, he did not consider the information provided to be adequate.

[92] His concern that the information provided failed to sufficiently particularise the work completed was understandable. The time records that he was provided recorded a specific date and work that had been completed on that date, but did not record the time spent on the work that was itemised. By way of example, when Ms XX records that she spent time on 25 January 2016 perusing the franchise agreement, the records provided to Mr ZZ did not record how much actual time was spent on that task.

[93] At hearing, Ms XX explained that the abbreviated time records provided to Mr ZZ, were administratively bolstered by a further set of time records, which recorded the actual time spent on a particular activity.

[94] She confirmed that the complementary set of records were provided to the cost assessor, who reported to her that he had cross-referenced her time records, with the evidence of the work completed on her file.

[95] That is confirmed by the cost assessor's report.

[96] The Committee's file provided on review did not include the time records which recorded the time spent on work relating to Mr ZZ's file.

[97] It would have been difficult for Mr ZZ, on the basis of the information received, to determine how much time had been spent on his file.

[98] When request is made of a lawyer to provide copies of time records, those time records will only provide useful insight into the work done if it is evident from the records how much actual time has been spent on a particular task.

[99] Whilst it was regrettable that the full records were not provided to Mr ZZ, I am satisfied that both the cost assessor and the Committee (both of whom had access to the practitioners' files) were fully informed as to the extent to which the time recorded by Ms XX, reflected time spent.

[100] The event which significantly contributed to Mr ZZ's sense that he had been unfairly treated by his lawyers, was the decision made by the lawyers to deduct fees from funds held.

[101] It is fair to say, that Mr ZZ was outraged when he learnt that fees had been deducted without, he says, his knowledge or his authority to do so.

[102] The extent to which he felt aggrieved is accurately gauged both by the manner in which he describes the transaction (theft) and the action he considers should properly follow (a referral to the police).

[103] In couching his concerns in this manner, Mr ZZ raises the spectre not just of a conduct breach, but the possibility of criminal conduct.

[104] It is commonplace in circumstances where a lawyer holds funds on behalf of the client, and the client has an obligation to pay the lawyer's fees, that a lawyer will seek to deduct their fees from funds held on trust.

[105] It has been noted, that there are a "number of sources of guidance in respect of what preconditions must exist for a lawyer to take fees from funds held in trust, and not all are entirely consistent".[8]

[106] Section 110 of the Act provides that a lawyer holding funds on behalf of any person must "ensure that the money is held, exclusively for that person, to be paid to that person or as that person directs".

[107] Regulation 9 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008, provide that a lawyer may not debit fees from funds held in trust unless:

(a) a dated invoice has been issued in respect of those fees, and a copy of the invoice is available for inspection by the Inspectorate; or

(b) an authority in writing in that behalf, signed and dated by the client, specifying the sum to be so applied in the particular purpose to which it is to be applied has been obtained and is available for inspection by the Inspectorate.

[108] A further requirement for deduction of funds, is found in r 3.4(a) of the Rules, which directs that a lawyer is obliged to inform a client of:

> the basis upon which fees will be charged, including, when payment of fees is to be made, and whether the fee may be deducted from funds held in trust on behalf of the client.

[109] The decision of the High Court in *Heslop v Cousins* makes it clear that a practitioner cannot rely solely on reg 9 as authority to deduct fees. In that case, the court said:[9]

---

[8] Webb, Dalziel and Cook, above n 5 at 328.
[9] *Heslop v Cousins* [2007] 3 NZLR 679 (HC) at 710.

> …. A client's direction is fundamental and must be obeyed. Regulation 8 [now 9] is subordinate to that requirement and cannot override it. Thus even if an account is rendered a solicitor is not entitled to deduct his or her costs from funds held in the trust account if the deduction would be contrary to the client's direction.

[110] Faced with apparent uncertainty as to approach to be followed by practitioners when considering deduction of fees from a client's account, the then President of the Zealand Law Society wrote to the Society members on 11 August 2009, to outline the "prudent" course that lawyers should follow when deducting fees.

[111] The Society recommended that if practitioners were considering deducting fees, that the practitioner should:

(a) advise the client in the terms of engagement that funds may be deducted from those held on trust;

(b) ensure the client accepts, in writing, the terms of engagement; and

(c) comply with reg 9 at the time the fee is deducted by issuing an invoice prior to or immediately after the deduction

[112] As the Committee noted, the lawyers' terms of engagement recorded that they "may deduct from funds held on your behalf any fees, disbursements or expenses for which we have provided an invoice".

[113] Attached to the terms of engagement, was a schedule detailing the factors to be taken into account when setting fees. The factors recorded identify those set out in r 9 of the Rules.

[114] Mr ZZ took exception to the attaching of the schedule to the letter of engagement. He appeared to consider that there was something untoward in the lawyer's providing this information to him. This submission was difficult to follow. It presented as both informative and uncontentious for the lawyers to clarify for their client's benefit, the factors which would be taken into account in setting the client's fee.

[115] I do not propose to address argument as to whether the approach to the deduction of fees was appropriate (to the extent that it followed the recommendations provided to practitioners by the Law Society) or inappropriate (by dint of argument that the approach adopted failed to reflect the appropriate degree of client direction seemingly required by *Heslop)* as there is no need for me to do so.

[116] It is clear that when Mr ZZ raised complaint that fees had been deducted, the lawyers promptly agreed to release the funds.

[117] As noted, the lawyer's letter of engagement recorded that fees may be deducted from funds held. An invoice was provided to Mr ZZ at the time the fees were deducted. The fees were immediately refunded when objection was raised. That prompt response, together with the evidence of the lawyers having followed the practice for deduction recommended by the New Zealand Law Society, persuades me that it is unnecessary to traverse further, issues surrounding the deduction of fees.

[118] Attention then turns to the reasonableness of the fee.

[119] Calculating the fee by reference to the time recorded as having been spent on the file, resulted in a fee of $14,097.

[120] The fee charged was $19,785.

[121] Mr UU explained that it was the practice of his firm, when a fee was charged which exceeded $3000, for the directors to meet and discuss the fee. On occasions says Mr UU, a decision would be made to reduce the fee, on others, a decision to increase the fee.

[122] That process, emphasised Mr UU, was intended to ensure that fees charged were fair and reasonable, and that the fee charged was fairly reflective of the work that had been done on the file and appropriately recognised the myriad of factors that are taken into consideration when setting a fee.

[123] It was Ms XX's view that she had not recorded a significant amount of her time that had been spent on Mr ZZ's file. She submitted that her time records did not provide accurate account of the work that had been done.

[124] The factors that the lawyers considered to have been of particular significance, were the complexities of the issues engaged by the file and the urgency that had to be brought on occasions to the file.

[125] Mr ZZ indicated at hearing that he accepted liability for the $14,097 component of the fee, but objected to paying the additional $5,688 which reflected the increase (by reference to time recorded) which the lawyers considered to be reasonable in the circumstances.

[126] That increase has been variously described in the complaint proceedings as a "success fee", "premium", and an "uplift".

[127] It was Mr ZZ's view that there was no justification for the lawyers charging more than a fee calculated by reference to the time recorded.

[128] A finding that a lawyer has charged a fee that is not considered fair and reasonable, has potential to carry a significant disciplinary consequence for a lawyer.

[129] Under the Act, complaints about fees are treated in the same manner as any other complaint about a lawyer's conduct. If a Standards Committee forms the view that a fee has not been fair and reasonable then the lawyers conduct constitutes unsatisfactory conduct in terms of s 12(c) of the Act by breach of r 9 of the Rules.

[130] When examining the reasonableness of a fee, neither a Standards Committee, nor this Office, is likely to "tinker" with a fee.

[131] It has been recognised that determining a reasonable fee "is an exercise in assessment, an exercise in balanced judgement, not an arithmetical calculation".[10]

[132] Attention then turns to the fee factors required to be addressed under r 9 of the Rules.

[133] Importantly, before addressing the specific fee factors, r 9 alerts lawyers to the requirement that their fee be both fair and reasonable for the services provided, and that the fee be calculated with regard to the interests of both client and lawyer as well as the factors set out in r 9.1.

[134] The fee factors set out in r 9.1 provide useful guidance to the matters to be considered, but inevitably some of the fee factors will assume more relevance than others.

[135] A starting point is to consider the nature of the retainer, the fee customarily charged for the work involved, the skill and experience of the lawyer, and the time recorded on the file.

[136] These factors having been addressed, attention can then properly turn to a consideration of any remaining factors that present as of particular relevance to a particular case.

[137] I am satisfied after hearing from the parties, that there were issues with the file that inevitably demanded more time to be spent than would usually be the case.

[138] The most obvious of these was the fact that the initial agreement could not proceed and had to be resurrected. Added to this, was the concern regarding the

---

[10] *Property and Reversionary Investment Corp Ltd v Secretary for State of the Environment* 1 WLR 1504 (QB).

undertaking that had to be provided. These complications would inevitably have required Ms XX to spend more time on the file than would have been initially anticipated.

[139] I am not persuaded however that these particular complications would have presented as being especially challenging to deal with for an experienced practitioner as Ms XX was. It is not uncommon for purchase agreements to fall over, but to then proceed after further negotiation. The undertaking issue, whilst undoubtedly one which Ms XX was required to handle with a degree of sensitivity and care, did not require a sustained input of work or difficult legal analysis to resolve. Ms XX was correct to immediately identify that she would be unable to file the undertaking without disclosing the information Mr ZZ had provided to her. Mr ZZ appears to have recognised reasonably quickly that the sale could be irreparably jeopardised if an undertaking wasn't provided and he gave instructions to give the undertaking in a modified form.

[140] The costs assessor did not consider the transaction to be "particularly complex" and I agree with him. Whilst there was a considerable amount of work that needed to be done, the transaction itself was not inherently complicated. There were difficulties along the way, but none in my view that presented as remarkable, or that would significantly challenge an experienced and competent lawyer.

[141] I also accept the costs assessor's conclusion that Ms XX's charge out rate was relatively low. She was an experienced practitioner on the cusp of being made a director of the firm. But it was Ms XX's (or her directors') decision to set her hourly rate. If time recording and hourly charge out rates were determined at the commencement of the retainer to provide the substantive foundation for calculation of the fee at the completion of the retainer, that was the decision of the lawyers.

[142] I am uncertain as to whether Mr ZZ was provided at commencement with details of Ms XX's hourly rate. I see no indication in the letter of engagement of him being provided with that information.

[143] A consistent message for lawyers running through the conduct rules, is the need to ensure that clients are kept informed. The lawyers were conscientious in ensuring that Mr ZZ was informed as to the factors that would be taken into account when setting his fee. Inclusion in the terms of engagement of clarification as to the hourly rate that would be charged for the services provided, would have further enhanced the commitment of the lawyers (as evidenced by the client care charter which formed part of the terms of engagement) to ensure that Mr ZZ was provided with relevant information.

[144] It is frequently the case, that the starting point for assessing a fee, is a consideration of the time recorded by the lawyer as having been spent on the file.

[145] Whilst it has been emphasised that it is inappropriate to place undue reliance on time costing alone,[11] and that time recorded should not on its own determine the reasonableness of the fee, when time is being charged at an hourly rate, it is incumbent on the lawyer to ensure that accurate time records are maintained.[12]

[146] Ms XX says that she failed to record all her time spent on the file, and it is apparent that the cost assessor considered the factors of unrecorded time and urgency to be the features of most significance in determining the reasonableness of the lawyer's decision to charge what the cost assessor described as a "premium" of $5778, over the time recorded.

[147] It is difficult for lawyers to accurately record every unit of time spent on a file. A slavish commitment to ensuring that every unit of time is recorded can be diverting for a lawyer. When a lawyer is properly focused on the intricacies of their client's case, meticulous attention to time recording can, on occasions, be subsumed by the focus and attention the lawyer is providing to their client's affairs.

[148] An excessively zealous approach to time recording, can result in time being inflated beyond what would be considered reasonable.

[149] Whilst I accept that Ms XX spent more time on the matter than was reflected in her time records, if time records are to have any relevance to the task of accurately calculating fees, any acceptable degree of deviation from the recorded time, either upward or downward, must be relatively modest if the time records are to be credibly relied on.

[150] Nor is it acceptable for a lawyer to justify a significant increase in fee, by simple explanation that more time was spent on the file than was recorded.

[151] If a lawyer who is called on to justify the reasonableness of a fee charged, provides explanation for the fee charged by argument that significantly more time was spent on the file than is reflected in the time records kept, the lawyer should be able to identify the areas where that substantial time was spent.

[152] In this case, the time recorded was reflected in a fee of $14,097. The uplift in the fee of $5778, represented a 29 per cent component of the total fee charged and a

---

[11] *Chean v Kensington Swan* HC Auckland CIV 2006-404-1047, 7 June 2006 at [23].
[12] *Property and Reversionary Investment Corp Ltd v Secretary for State of the Environment*, above n 10.

41 per cent increase on the fee which had been calculated on the basis of time recorded.

[153] Proportionally, that is a significant increase in fee, and not one which can be justified by simple explanation (unsupported by evidence) that more time was spent on the file than had been recorded.

[154] It is not the case that the premium is justified solely by reference to the unrecorded time factor, but it is clear that Ms XX's argument that her time records did not accurately record time spent, was significant for both the cost assessor and the Committee.

[155] The cost assessor's report does not address the issue of the premium charged in detail, simply noting, that:[13]

> following discussion with Ms XX, she advised that due to the time pressures it is unlikely that the time actually recorded is reflective of the actual time spent i.e. much more time spent than recorded. The "premium" was charged to cover that and the very large urgency factor.

[156] I intend no criticism of Ms XX when I note that her reported response to the cost assessor required a more fuller explanation than simple recourse to the general statement that more time was spent on the file than had been recorded. It may have been the case that Ms XX provided fuller account to the assessor than is reflected in the assessor's report.

[157] I have carefully scrutinised the time records provided by Ms XX. Those records comprise almost six full pages of notations.

[158] The records present in my view as reflective of a practitioner who appears to have been conscientious in her record-keeping.

[159] Ms XX was unable (through no fault of hers) to finalise settlement of the transaction on settlement date. Further work was required to complete settlement.

[160] In presenting her account to Mr ZZ on 29 January 2016, Ms XX was electing to finalise her account on the basis that the account would cover the anticipated further work to complete settlement.

[161] Following request from Mr ZZ, Ms XX provided Mr ZZ with her time records, albeit as noted, those records simply documented work that had been done, without reference to actual time spent on the work recorded. Her itemised summary of the

[13] Cost assessors report 16 August 2017, page 3.

work completed to reflect the invoice provided to Mr ZZ on 29 January 2016, included work completed to 1 April 2016.

[162] To the extent that her records appear to reflect a conscientious approach to timekeeping, I note that every item of correspondence between Ms XX and Mr ZZ which has been provided by the parties on review, is notated in her time records.

[163] Urgency was the other factor that was considered by the cost assessor to be of particular relevance.

[164] The Committee, in what was a relatively limited analysis of the fee issue, noted that it had, when considering the fee, considered the cost assessors report but, as was appropriate, exercised its independent judgement when determining the reasonableness of the fee.

[165] The factors considered by the Committee to be of particular relevance, were that the transaction was of "high importance" to the client, and the level of urgent attention the file required.

[166] I do not consider the importance of the matter to the client to assume a special relevance here.

[167] Understandably, it was important to Mr ZZ that his business transaction be satisfactorily concluded, but every client's business is of importance to the client. In order to merit an increase in fee on the basis of importance to the client, more is required than the understandable desire of all clients to have the matter which they bring to their lawyer's door, efficiently resolved.

[168] Turning to argument that the urgency factor was significant in setting the fee, again, it is important to not just simply record one of the r 9 factors for consideration, but to provide explanation as to why the factor is of particular relevance.

[169] The issue of urgency appears to have arisen because the lawyers were provided with documents at last minute. Ms XX had some difficult deadlines to meet and I am satisfied that on occasions she was required to put other work to one side to focus on meeting some very tight, and perhaps unrealistic, timeframes. The urgency and circumstances in which the matter is undertaken and any time limitations imposed by the client are of relevance in determining the level of fees.[14]

[14] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.1(d).

[170] However, if a lawyer is accurately recording time, it would be expected that any additional time required to be spent on the file which arose as a consequence of having to address issues with the file on an urgent basis, would be reflected in the time recorded.

[171] It is not uncommon in commercial transactions of the nature engaged here, for security documentation to be provided at last minute and for urgent attention to be accorded to a file to ensure compliance with conditions in sale and purchase agreements.

[172] I have, in considering the fee charged, stepped back as I am required to do, and looked at the fee charged "in the round", and with particular reference to the r 9 factors.

[173] Having done so, I consider it appropriate to refer the fee issue back to the Committee for further consideration.

[174] That inquiry should focus on the issue as to whether the increase in fee of $5,688.00, over the fee reflected in time recorded as having been spent on the file, resulted in a fee that was fair and reasonable.

[175] In all other respects, the decision of the Committee is affirmed.

Decision

(a) Pursuant to s 209 of the Lawyers and Conveyancers Act 2006, I direct the Committee to reconsider Mr ZZ's complaint that the fee charged was unreasonable.

(b) In all other respects, the decision of the Standard Committee is confirmed

DATED this 26th day of September 2018

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:
Mr ZZ as the Applicant
Ms WW as the Respondent
Mr VV, Mr UU & Ms TT as Related Persons
[Area] Standards Committee
New Zealand Law Society