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

[2023] NZLCRO 133

Ref: LCRO 130/2022

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|---|---|
| **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** | **FN**<br>Applicant |
| **AND** | **EO**<br>Respondent |

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

[1] Mr FN has applied for a review of the determination by [Area] Standards Committee [X] in which the Committee made a finding of unsatisfactory conduct against Mr FN and imposed orders. One of the orders made was to censure Mr FN. The Committee called for submissions on publication.

[2] Subsequently, the Committee has issued its determination on publication in which it ordered that a summary of the facts, outcomes and orders made, and Mr FN' name, be published. Publication was deferred pending the outcome of Mr FN' review of the findings determination.

[3] Mr FN' has also lodged an application for review of the determination ordering publication.

[4] It was initially intended that both reviews would be processed together. However, subsequently, and at the review hearing,[1] I advised Mr FN and his counsel that I would defer completing a review of the publication decision until the review of the

[1] On 11 October 2023.

findings decision had been completed, as the publication determination would only be implemented if the findings decision, and particularly the censure order, were confirmed.

[5] As the Committee's censure has been reversed, the determination of the Committee to proceed with publication is reversed in a separate decision.

**Background**

[6] At the time the events giving rise to Ms EO's complaints took place, Mr FN was employed by the firm known as [Law Firm A]. The principal of [Law Firm A] is Mr TX.

[7] [Law Firm A] retained the services of a [Nationality] manager, HW, whose role was to assist [Nationality] persons to receive legal advice from the firm.

[8] During February and March 2019, a number of [Nationality] persons contacted HW for assistance to recover money that had been 'invested' with a company, [Company A Ltd] ([Company A]).

[9] The 'investors' had become aware that their funds were part of a [redacted] scheme run by the principal of the company, Mr VI.

[10] At some point in time, Mr VI had committed suicide.

[11] At the time HW came into contact with Ms EO and her father (Mr ZQ), funds had been invested by them with [Company A] through a company, [Company B Ltd].

[12] From the correspondence available, it seems that Mr ZQ was reluctant to become involved with attempts to recover his funds, but he and Ms EO met with Mr FN on 19 March 2019.

[13] In a memorandum to Mr TX following receipt of Ms EO's complaints, Mr FN says:[2]

> On 19 March 2019 (as recorded in my notes made at the time) I advised EO that their funds (of just over $1m) were likely lost but that for $10,000.00 + GST we could take steps to liquidate the company (then hold the liquidator to account), and for a further $20,000.00 + GST we could investigate if we could establish a personal liability on surviving individuals (as there was some talk of a liability of the accountants and [Law Firm B] giving advice).

[14] An invoice was sent to [Company B Ltd] on 21 March 2019 summarising the work to be undertaken as follows:

> Matter: Statutory Demand and [redacted] claim

[2] Memorandum FN to TX (11 August 2021) at [5].

| Description | Charge/Debit |
|---|---|
| For our professional service fee to serve Statutory Demand and file to liquidate [Company A] Limited | 9,230.43 |
| For our professional fee to investigate the affairs of [Company A] Limited, any and all companies of Mr SK and Ms DZ, and to bring a claim against the Estate of SK – this towards to Stage 1 of this process – investigation and reporting … | 20,000 |
| **Office charges:**<br>Expense recovery for file creation, photocopying, fax, email and phone calls as required | 0.00 |
| **Sub-Total:** | 29,230.43 |
| Plus GST (GST rate 15%) | 4,384.56 |
| **Disbursements (GST Inclusive)** | |
| Filing Fee Court Liquidate company | 540.00 |
| Process Server statutory demand | 172.50 |
| Process Server liquidation proceedings | 172.50 |
| **Sub Total** | **34,499.99** |

[15] The total invoice (including GST and disbursements) amounted to $34,499.99.

[16] This invoice was paid.

[17] Mr FN' proposed course of action was to serve a statutory demand on the company for repayment of funds, followed by an application to the High Court to place the company into liquidation. Mr FN then intended to liaise with the liquidator with a view to obtaining the company's bank statements in an effort to trace Mr ZQ's funds.

[18] Ms EO says that she received no updates from Mr FN and only became aware in March 2021 that he had left the firm.[3]

[19] As a result of Ms EO's request for information in April 2021, Mr FN sent a report[4] addressed to [Company B Ltd]. He advised that the statutory demand had been served on 1 April 2019, but he had then become aware that the company had been placed into liquidation by another creditor.

[3] There is uncertainty about the date Mr FN left the firm. An email from Mr AC, to the [Government Agency] on 26 March, advised that Mr FN had left. In his submissions for this review, Mr JL says that Mr FN left on 28 March. At the review hearing, Mr FN advised that he had left the firm at a later date.

[4] The report is dated 12 April 2021.

[20] Mr FN reported that he had spent approximately 100 hours going through approximately 3,000 pages of emails, flyers and other notes that had been supplied to him by another client in an endeavour to find information that would enable a claim to be brought against persons associated with [Company A]. He advised that the time spent would result in a fee of $40,000 plus GST, which was at the lower end of the potential fee that Mr FN had advised at the meeting on 19 March 2019.

[21] This differs from Mr FN' advice in his letter dated 12 April 2021, that he had spent approximately 100 hours reviewing all the material relating to the matter. These inconsistencies reinforce the scepticism of the Committee and myself as to the reliability of the retrospectively-complied time report.

[22] Mr FN also advised that he had been providing six monthly reports to HW and expressed surprise that she had not passed these on to Ms EO.

[23] Finally, Mr FN advised that the [Government Agency] was undertaking an investigation of the company and other companies involved in the [redacted] scheme and recommended that the Office be left to continue investigations to see what could be recovered. Shortly after, Ms EO terminated her instructions.

**Ms EO's complaints**

[24] Ms EO lodged her complaints on 24 July 2021. She complained that she had received minimal information from Mr FN between 19 March 2019 and April 2021. She said that she had not "seen any progress (either successful or unsuccessful)" and only found out that Mr FN had left the firm when she made contact in March.

[25] Ms EO also complained about Mr TX who had declined to reduce the fees charged by Mr FN.

[26] Ms EO says that from the information received in response to a Privacy Act request, she could only ascertain that the work completed was the preparation and service of the statutory demand.

[27] She sought a "fair and reasonable adjustment of the fee".

**Mr FN' response**

[28] Mr TX responded briefly for himself and included a memorandum from Mr FN dated 11 August 2021 addressing Ms EO's complaints.

[29] Mr FN says that he had advised HW on 26 February 2019 that it would be difficult to establish personal liability of individuals associated with the company and scheme. He says that he had kept HW updated on a regular basis and had also sent emails direct to Ms EO.

[30] Mr FN advised that the firm does not keep time records as all of the firm's work was invoiced on a fixed fee basis. He nevertheless provided an approximate work in progress report that he had prepared following receipt of the complaint.

[31] This report indicated that he had spent 689 six-minute units of time, which resulted in a fee of $27,560 when applying his charge out rate of $40 per unit.

[32] He also referred to the documentation that he had received from another client which he had reviewed to establish whether there were grounds to pursue personal liability against individuals associated with the scheme.

**The Standards Committee determination**

[33] The Standards Committee identified the following issues to be addressed:[5]

> a. whether Mr FN acted in the timely and competent manner in providing advice to [Company B], and kept [Company B] informed about progress on the retainer;
>
> b. whether Mr TX had failed to supervise and manage the work of Mr FN;
>
> c. whether the fees charged by [Law Firm A] were fair and reasonable.

*Competence and timeliness*

[34] The Committee referred to the requirements of r 3[6] and 7.1[7] of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Conduct and Client Care rules).

[35] The Committee:[8]

> … noted the work undertaken by Mr FN in his management of the retainer, and found a number of failings from the material on the file. Particularly, it noted that there had been little work on the [Company B]' file between 2019 and April 2021, other than a few emails. The file included an email which copied Ms EO into Mr FN' correspondence with the [Government Agency] on behalf of other clients.

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[5] Standards Committee determination (3 November 2021) at [13].
[6] Rule 3 requires a lawyer to act with competence and in a timely manner.
[7] Rule 7.1 requires a lawyer to take reasonable steps to ensure that a client understands the nature of the retainer and to keep the client informed about progress on the retainer.
[8] Standards Committee determination, above n 6, at [15].

[36] The Committee also noted that Mr FN' report to [Company B] was sent only after Ms EO had requested an update. It considered:[9]

> … that a substantive response on progress on the retainer could have been expected and should have been forthcoming during the course of the retainer. The response to Ms EO's termination of the retainer and advice that the matter was inactive, was a clear indication that there had been shortcomings in the level of communication and updates regarding the progress on the matter.
>
> From the material available on the file the Committee was not satisfied that the instructions had been carried out in a competent manner and did not consider that Mr FN had progressed matters for [Company B]. As a result, it concluded that he had failed to act in either a competent or timely manner in breach of Rule 3 of the Rules.
>
> The Committee also considered that Mr FN had breached Rule 7.1 of the Rules as it could find no information on the file which indicated that Mr FN had updated [Company B] or consulted with it in the steps to be taken to progress the retainer with any regularity.

*Fees*

[37] The Committee did not consider that it could rely upon the time summary provided by Mr FN as this had been compiled following receipt of the complaint.[10]

> The Committee also considered that [Company B] was charged for work which was carried out on behalf of multiple clients for which Mr FN was engaged to act against [Company A]. In this regard the Committee noted that the letter of engagement issued to [Company B] contained no advice that although Mr FN was acting for other [Company A] investors, there would be no duplication of charging. From the material on the file, the Committee was not satisfied that the time charged for the matter was justified, nor had [Company B] benefitted from the services being performed properly, particularly having regard to the Committee's finding regarding the competency of the representation, as discussed above.

[38] Having made these observations, the Committee concluded that the fees charged by Mr FN were not fair and reasonable and they were "well outside of the range of what would customarily be charged by other practitioners working in a similar market".[11]

[39] The Committee members engaged in work of this nature considered that a "fee for serving a statutory demand would commonly be in the range of $1,000 to $1,200".[12]

[40] The Committee also noted that the invoices stated that "this fee in part related to the filing of liquidation proceedings".[13]

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[9] At [16]–[18].
[10] At [25].
[11] At [26].
[12] At [26].
[13] At [27].

> … When considering the amount of work that was undertaken that was of actual value to [Company B] and with regard to the reasonable fee factors set out under Rule 9.1, the Committee reached the view that an appropriate fee for the investigations that were conducted would have been in the vicinity of $2,500. The Committee was therefore satisfied that Mr FN had breached Rule 9 in invoicing fees which were not fair and reasonable.

[41] The Committee determined that the fees charged by Mr FN exceeded what was fair and reasonable and that Mr FN had breached r 9 of the Conduct and Client Care rules.

*Conclusion*

[42] "Having concluded that Mr FN had breached his obligations under Rule 3, 7.1 and 9 the Committee was satisfied that these breaches amounted to unsatisfactory conduct pursuant to section 12(c) of the Act."[14]

**Orders**

[43] The Committee said:[15]

> In considering the orders to impose, the Committee was of the view that Mr FN' conduct was towards the more serious end of the scale of unsatisfactory conduct. It had found multiple breaches of the Rules, the issues regarding his representation of [Company B] had been occurred over a lengthy period, and it also had regard to Mr FN' disciplinary history. The Committee therefore considered that it would be appropriate to order a censure and impose a fine on Mr FN.

[44] The Committee:

Censured Mr FN.

Imposed a fine of $5,000.

Ordered Mr FN to pay $500 by way of costs.

Ordered Mr FN and Mr TX to reduce the invoice issued by them as follows:[16]

i. The amount relating to the statutory demand is reduced from $9,230.43 to $1,500 plus GST and disbursements of $172.50; and

ii. The amount relating to the investigation of [Company A] and assessment of options to make a claim is reduced from $20,000 to $2,500, plus GST;

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[14] At [29].
[15] At [32].
[16] At [34].

[45] At paragraph [35] of its determination, "the Committee directed that the fine, costs and refunds must be paid and the apology[17] provided, within 30 days of the expiration of the period for lodging" an application for review.[18]

*Publication*

[46] The Committee called for submissions as to whether or not the determination, including Mr FN' identity, should be published.

**Mr FN' application for review**

[47] Mr FN submitted that the Committee had not taken a number of factors into account when making its determination:[19]

> a. The Lawyer did not have a mobile phone number for Ms EO and all oral communication was done with an interpreter present (Ms EO did speak good [Language B] but was apprehensive when serious matters were being discussed).
>
> b. Regular oral (and some emailed) updates were provided to the [Language] interpreter who worked within [Law Firm A] and the Lawyer understood Ms EO was happy with the level of reporting.
>
> c. [Law Firm A] frequently operates on fixed fee invoicing and does not usually record hours contemporaneously. Having said that, the WIP Report was compiled from work carried out on the matter and it is accurate.
>
> d. The Lawyer did not record 689 hours on this matter but 689 6 minute units (or 68.9 hours).
>
> e. It was not a failing to refer to other victims of the [redacted] Scheme as [Law Firm A] has approval from the client to have their information shared (this was a person was a client prior to the [Company B] engagement).
>
> f. Very importantly, [Law Firm A] did not have any other clients relating to the [redacted] Scheme at the time other than [Company B]. The time spent on the affairs of other clients (and in travelling to meet the prospective client in a [Suburb A] café) was for the sole benefit of [Company B] to build evidence of the professional advisers to [Company A] having a liability.
>
> g. The "statutory demand" matter was not for a simple statutory demand (which the firm does for $500.00 + GST). It was for the statutory demand and the intended liquidation proceedings combined. These were not as straight forward as a regular case as the Lawyer was involved in communication with the principal offender of the [redacted] Scheme when he committed suicide so additional urgent research was required as to an address for service and whether others should or could be bound into the same proceeding at the same time.

[17] The Committee had not ordered Mr FN to apologise to Ms EO.
[18] Standards Committee determination, above n 6, at [35].
[19] Mr FN' application for review (8 August 2022), at [3].

[48] Mr FN says that Ms EO and her father were aware at the time that the engagement was accepted that overall fees could be in the region of $100,000 and that no result could be guaranteed for the initial payment.

[49] Mr FN takes issue with the comment by the Committee about his previous disciplinary history.[20]

*Outcome*

[50] Mr FN seeks the following outcome:[21]

> The fee payable for the statutory demand/liquidation matter be set at $2,500.00 + GST (down from $10,000.00).
>
> The fee payable for researching whether there was a cause of action for recovery against other individuals be set at $16,000.00 + GST (down from $20,000.00).
>
> The removal of the finding of unsatisfactory conduct.
>
> The removal of a fine of $5,000.00.
>
> The removal of a costs award of $500.00.

**Ms EO's response**

[51] Ms EO continues to be unhappy at the lack of information about the work undertaken by Mr FN and supports the findings of the Committee.

**Process**

[52] This review progressed with an applicant-only hearing on 11 October 2023, attended by Mr FN and counsel, Mr JL. Ms EO did not exercise the opportunity to attend.

**Nature and scope of review**

[53] The High Court has described a review by this Office in the following way:[22]

> A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO's own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee's determination.

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[20] Standards Committee determination, above n 6, at [32].
[21] Mr FN' application for review, above n 19, at [9]–[13].
[22] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

[54] This review has been conducted in accordance with those comments.

**Review**

*Rule 3*

[55] Rule 3 of the Conduct and Client Care rules provides:

> In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[56] This requirement is also part of the definition of unsatisfactory conduct in s 12(a) of the Lawyers and Conveyancers Act 2006.

[57] The difficulty in examining whether Mr FN has breached this rule or not, is the dearth of information on the file. There is only the general advice from Mr FN that he reviewed some 3,000 items of correspondence, file notes and documentation provided to him by another client. There are no file notes of work undertaken.

[58] This work undertaken by Mr FN was to enable him to establish whether personal liability could be pursued against individuals, including Mr VI's professional advisers.

[59] The failure to report to Ms EO, as discussed in the next section of this decision, is the only indication that Mr FN was not giving the required degree of attention to Ms EO's matters.

[60] Somewhat perversely, the lack of information on the file means that the finding that Mr FN did not act competently and diligently cannot be confirmed.

*Rules 7 and 7.1*

[61] Rules 7 and 7.1 provides:

> 7 A lawyer must promptly disclose to a client all information that the lawyer has or acquires that is relevant to the matter in respect of which the lawyer is engaged by the client.
>
> 7.1 A lawyer must take reasonable steps to ensure that a client understands the nature of the retainer and must keep the client informed about progress on the retainer. A lawyer must also consult the client (not being another lawyer acting in a professional capacity) about the steps to be taken to implement the client's instructions.

[62] The first, and important, information, that must be provided to a client, is the information required to be provided by rr 3.4 and 3.5. On 26 March 2019, Mr TX sent

the firm's standard terms and conditions of engagement to Ms EO. This does not satisfy the requirements of the Rules.

[63] At the review hearing, Mr FN advised that no letter of engagement and supporting information had been provided to Ms EO. He made the somewhat surprising comment that Mr TX had directed that letters of engagement were not to be provided.

[64] The situation is unclear and I have briefly considered whether the issue should be referred back to the Committee to investigate and rule on, but that is not a critical aspect of Ms EO's complaint. It is, however, a matter which goes to support the complaints about a lack of information provided to Ms EO.

[65] Ms EO heard little of substance from Mr FN for a period of some two years between March 2019 and April 2021. Mr FN says he reported regularly to HW and relied upon her to pass on the information to Ms EO. In contradiction to this, he said at the review hearing, that as there was nothing to report, he did not report to Ms EO. There are no file notes about discussions with HW, and even accepting that he did regularly report to her, I do not consider that this fulfils Mr FN' obligations to Ms EO.

[66] Mr FN says he did not report directly to Ms EO because her [Language B] was limited and all oral communications with her was with an interpreter present. Whilst this may not have been possible for a brief telephone call, the time estimates provided by him to the Committee include at least one meeting with HW occupying one and a half hours. Ms EO should have been given the opportunity to attend that meeting and have HW interpret for her. In addition, there is no reason that Mr FN could not have corresponded with Ms EO in [Language B] and she could have had the option of having someone interpret anything she did not understand.

[67] I also consider that Mr FN has overstated Ms EO's lack of understanding of [Language B]. The correspondence from her to both [Law Firm A] and in conjunction with her complaint and this review, indicates that she has a reasonable grasp of the [Language B] language sufficient to understand most of what Mr FN had to report.

[68] This lack of direct communication with Ms EO over a period of some two years is startling. It is surprising that Ms EO herself did not ask for updates during that time. The fact that she did not supports Mr FN' contention that she was being kept up to date by HW.

[69] However, as noted above, I do not think that satisfies Mr FN' obligation to report to Ms EO directly.

[70] The most obvious piece of information that should have been reported to Ms EO, is that Mr FN could not find any evidence that would support a claim against individuals to recover the [Company B] funds.

[71] For these reasons, I confirm the Committee's findings of breach of r 7.1. I also include a finding that Mr FN has breached r 7.

Fees

*Rule 9 and 9.1*

[72] Rule 9 and 9.1 provides:

> 9. 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.
>
> *Reasonable fee factors*
>
> 9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:
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> (a) the time and labour expended:
>
> (b) the skill, specialised knowledge, and responsibility required to perform the services properly:
>
> (c) the importance of the matter to the client and the results achieved:
>
> (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client:
>
> (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved:
>
> (f) the complexity of the matter and the difficulty or novelty of the questions involved:
>
> (g) the experience, reputation, and ability of the lawyer:
>
> (h) the possibility that the acceptance of the retainer will preclude engagement of the lawyer by other clients:
>
> (i) whether the fee is fixed or conditional (whether in litigation or otherwise):
>
> (j) any quote or estimate of fees given by the lawyer:
>
> (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:
>
> (l) the reasonable costs of running a practice:

(m) the fee customarily charged in the market and locality for similar legal services.

[73] Mr FN invoiced Ms EO two days after she had met with him for the full amount of the fees fixed by him. The invoice was for $9,230.43[23] to serve the statutory demand and liquidate [Company A], and $20,000 to investigate and report possible causes of action against the estate of Mr VI and another.

[74] To these amounts was added GST and disbursements, making a total of $34,499.99.

[75] Ms EO paid this invoice.[24]

[76] Whilst it is common practice for a lawyer to request a payment on account of fees at the beginning of a retainer, it is unusual for the total fee to be invoiced at the commencement of instructions. At the review hearing, Mr FN advised that although the invoice was issued, it would not be processed. Again, this would be an unusual practice.[25]

[77] The overriding obligation is that a fee, whether established on a fixed basis or not, must not be more than is fair and reasonable. Having issued the invoice at the commencement of the retainer, Mr FN nevertheless retained an obligation to ensure that the fee was fair and reasonable. This would mean that at various points during the retainer, there was an obligation to review the fee charged against the work carried out.

[78] Mr FN says the firm did not have a time recording program. At the review hearing, he advised that he was able to retain in his mind an overview of the time spent on a particular matter without the assistance of any contemporaneous time records. That is of little use when the quantum of the fee is challenged.

[79] Mr FN retrospectively compiled a report of the time he assessed he had spent on the matter.

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[23] I can not find any explanation for this unusual amount. Mr FN' file note records a fee of $10,000.
[24] The date on which payment was made is unknown.
[25] It may be helpful to Mr FN in operating his new practice, to include here a quotation from an article by Paul Collins in LawTalk 900 4 November 2016:
"On the basis of the Court in *Skagen (Skagen v Wellington Standards Committee* [2016] NZHC 1772) there is no absolute prohibition on the practice of prospective fee invoicing on its own. However, a fee charging practice of that sort must still be accompanied by appropriate client safeguards including the ability to refund the fee if the services cannot be delivered, and the fee itself must still be fair and reasonable by reference to the fee factors in rule 9.1."

[80] It is difficult to accept the veracity of this report, covering, as it does, a period of more than two years, and I share the doubts expressed by the Committee[26] as to the reliability of the report provided by Mr FN.

[81] Mr JL submitted that the Committee (and myself by accepting the Committee's view) exceeded 'the ambit of its jurisdiction by saying that it could not rely on the information provided by the applicant relating to the invoicing …." [27] He did not expand on this submission at the review hearing and I have some difficulty in understanding his meaning.

[82] If a Committee determines to inquire into a complaint, as it has in this instance, it must necessarily make a decision on the reliability of the evidence available to it. Given the lapse of some two years between the commencement of Mr FN' instructions and the compilation of the report, it was reasonable for the Committee to have some doubts as to what weight it could place on the report.

[83] The times assessed by Mr FN in the report appear to be overstated. By way of example, I refer to:

- 'Researching' the website of [Company A] and possibly others – six hours.
- Searching Companies Office records and building a related companies table – six hours.
- Twenty-six units of time allocated to meeting another person who (presumably) Mr FN thought had useful information. The emails for the date of the meeting on 24 April 2019 would indicate that Mr FN met the person at the airport at 1:30 pm but had another commitment at 3 pm. This would not allow for a meeting in excess of two and a half hours.
- In addition, the material on the file shows that the meeting was in contemplation of this person instructing Mr FN.[28] This justifies the comment by the Committee that work was carried out for multiple clients.[29]

[84] The lack of anything on the file to verify many of the items in the report reinforces the doubts expressed by the Committee as to the reliance that can be placed on it.

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[26] Standards Committee determination, above n 6, at [24].
[27] JL submissions (29 September 2023) at [18(e)].
[28] Refer for example to the terms and conditions provided.
[29] Standards Committee determination, above n 6, at [25].

[85] The report provided refers only to the time which Mr FN assesses he spent on the matter. There are many judgments of the courts which observe that the calculation of a fair and reasonable fee is not established only by the time spent on the matter.[30] Regard must be had to all of the factors set out in r 9.1:

- (c) The results achieved. Little, if anything, was achieved for [Company B].
- (d) Urgency. There was no urgency involved and none evident from the file.
- (e) The amounts involved and risk. The amount involved was considerable but Mr FN assumed no risk.
- (f) Complexity. I accept that Mr VI's web of companies was complex.
- (g) The lawyer's experience. Mr FN had some six years' experience and advised that he had previously acted on six other matters involving company liquidations.
- (i) Fixed or conditional fee. Whilst the fee was expressed to be fixed, it was only fixed up to the investigatory stage and Mr FN did not file liquidation proceedings.
- (m) Rule 9.1(m) refers to the fee customarily charged in the market and locality for similar legal services. The Committee has expressed the view of members familiar with the work required to liquidate a company, that the fee charged by Mr FN was "well outside of the range of what would customarily be charged by other practitioners working in a similar market".[31] The Committee's view was that a fair and reasonable fee for the work carried out by Mr FN would commonly be in the range of $1,000 to $1,200. Nothing has been provided on review to challenge that view and Mr JL advises that the finding of the Committee, that the fee should be reduced to $1,500, is accepted.

[86] Mr FN' fees to investigate Mr VI's affairs and the potential liability of others was fixed at $20,000. Again, there is nothing on the file that substantiates this fee other than the retrospectively compiled work in progress report. There are no copies of the Companies Office records which Mr FN says he researched. There is no copy of the

[30] See for example *Property and Reversionary Investment Corporation Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 (QB) at 441-442.
[31] Standards Committee determination, above n 6, at [26].

table of the interconnection between the various companies. There are no file notes of what research was undertaken and the only information available is Mr FN' advice that he reviewed some 3,000 emails and records provided by others.

[87] Mr FN' hourly rate was $400. He says that he spent more than 50 hours conducting his research. Again, regard must be had to the other fee factors and in particular, nothing of value was achieved for [Company B].

[88] Mr FN has not provided any example of the nature of the material reviewed by him but it is reasonable to suggest that it should have been apparent at an earlier time from the nature of the material available to review, whether or not it was going to be useful to enable individuals to be pursued.

[89] Mr JL has pointed out the error in the Standards Committee determination when it refers to the time assessed by Mr FN as being 689 hours.[32] Applying Mr FN' hourly rate of $400, this would have resulted in a fee of $275,600. It is difficult to accept that the reference to 689 hours (as opposed to 689 units of time) is anything but an error.

[90] Mr JL also refers to the fact that [Law Firm A] operated on a fixed fee basis. As noted above, a lawyer's fee, fixed or otherwise, must be fair and reasonable. Mr JL says that there was unrecorded work of a greater amount undertaken. It is somewhat anomalous to refer to 'unrecorded' time, when no time was recorded. Consequently, there is no evidence of how much time beyond that assessed could be regarded as 'unrecorded' time. There is no evidence of what time he spent on the matter other than what the Committee and I consider to be the unreliable retrospective report.

[91] In all the circumstances I agree with the Committee that Mr FN has charged a fee that is more than fair and reasonable. That is what is required to establish a breach of r 9.

**Decision as to findings**

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

1. The finding of a breach of r 3 is reversed.

2. The finding of breaches of rr 7.1 and 9 is confirmed.

3. The determination is modified to include a breach of r 7.

[32] At [24].

4. The finding of unsatisfactory conduct on the part of Mr FN, pursuant to s 12(c) of the Lawyers and Conveyancer Act 2006, is confirmed.

**Orders**

[93] Neither Mr FN nor Mr JL have made submissions which centre specifically on the orders imposed by the Committee other than a submission that all orders should fall away, as they argue that the finding of unsatisfactory conduct should be reversed.

*Censure*

[94] The Court of Appeal has commented on the nature of a censure or reprimand in *New Zealand Law Society v B*.[33] It said:[34]

> [39] … Both words envisage a disciplinary tribunal, here a Standards Committee, making a formal or official statement rebuking a practitioner for his or her unsatisfactory conduct. A censure or reprimand, however expressed, is likely to be of particular significance in this context because it will be taken into account in the event of a further complaint against the practitioner in respect of his or her ongoing conduct. We therefore do not see any distinction between a harsh or soft rebuke: a rebuke of a professional person will inevitably be taken seriously.

[95] The Committee:[35]

> … was of the view that Mr FN' conduct was towards the more serious end of the scale of unsatisfactory conduct. It had found multiple breaches of the Rules, the issues regarding his representation of [Company B] had been occurred over a lengthy period, and it also had regard to Mr FN' disciplinary history. The Committee therefore considered that it would be appropriate to order a censure and impose a fine on Mr FN. …

[96] Mr FN takes issue with the reference to his disciplinary history. Mr JL says:[36]

> The Standards Committee seem to have been "tainted" with regard to its view of "the Applicant's disciplinary history". The Applicant was the subject of an invoice complaint in May 2022, which was upheld in <u>his</u> favour. There is therefore no basis to take into account his disciplinary history, and find it appropriate to censure or impose a fine in respect of this matter.

[97] Mr JL is not correctly informed by Mr FN.

[98] Mr FN has applied for five other reviews of adverse Standards Committee findings against him, four of which have been confirmed on review.[37] I do not know how

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[33] *New Zealand Law Society v B* [2013] NZCA 156.
[34] At [39].
[35] Standards Committee determination, above n 6, at [32].
[36] JL submissions (29 September 2023) at [22].
[37] The remaining review has yet to be completed.

many other complaints have been determined by a Standards Committee and not been reviewed by this Office.

[99] Whether or not the Committee was 'tainted' as Mr JL submits is moot, but Mr FN' disciplinary history is a relevant factor for the Committee to take into account when determining what orders to make following the finding of unsatisfactory conduct. Consequences should follow.

[100] In the text *Lawyers' Professional Responsibility* the author had this to say:[38]

> Where proven misconduct is antedated by adverse findings and disciplinary sanctions, a court or disciplinary tribunal may conclude that the lawyer has not learned from previous experience. Whereas one instance of misconduct may, where it is not serious, justify some leniency sanction-wise, recurrences speak of the lawyer's indifference to professional standards and thus the need for protecting the public from the lawyer's behaviour.

[101] Use of the word 'misconduct' here, may give the impression that the author is referring to more serious instances of shortcomings than are involved in this matter, but that is not necessarily the case, as the text primarily relates to disciplinary processes in Australia. The principles referred to are referable to all disciplinary processes.

[102] The fact that each adverse finding against Mr FN may arise out of dissimilar facts and conduct, does not mean that it is not necessary to provide the public with the opportunity to become acquainted with Mr FN' propensity to ignore professional standards.

[103] However, the fact that a censure is a precondition before publication can be ordered presents a bar to the Committee proceeding on the basis simply that it perceives a need to publish Mr FN' name because of previous adverse findings. The focus must be on whether a censure is appropriate to the facts of the complaint before it.

[104] Serious overcharging by a lawyer is a matter which requires consideration as to whether charges should be brought before the Lawyers and Conveyancers Disciplinary Tribunal.[39] The Committee did not consider this to be an appropriate step to take. That leads to the question as to whether the breach of r 9 should attract a censure, which as noted, is a 'serious rebuke'.

[105] In my view, the breach of r 9 by Mr FN is not such as should attract a censure.

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[38] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [23.125].

[39] See *Auckland Standards Committee v Castles [2013] NZLCDT 53 which refers to 'gross overcharging'*

[106] That leaves the question as to whether or not the breaches of r 7 and 7.1 are sufficient to attract a censure.

[107] Without diminishing the concerns about the lack of reporting to Ms EO by Mr FN, she was not unduly or detrimentally affected.

[108] Taking these observations into account, I do not consider that a censure is an appropriate order to be made in this instance. As a result, there can be no publication.

*Fine*

[109] Mr FN' previous disciplinary history that I am aware of, and the Committee has referred to, cannot be ignored. There is an indication that Mr FN exhibits some degree of indifference to the need to comply with professional standards, and I consider the manner in which this concern should be expressed, is to increase the fine imposed from $5,000 to $7,500.

*Fee*

[110] The Committee ordered that the fee of $9,230.43 relating to service of the statutory demand and liquidation, be reduced to $1,500 plus GST and disbursements of $172.50.

[111] Mr FN has accepted that reduction.

[112] The Committee ordered that the fee relating to the subsequent investigation be reduced from $20,000 to $2,500 plus GST.

[113] That order was made against both Mr FN and Mr TX. As the fee was paid to [Law Firm A], the order against Mr FN is reversed unless his remuneration as an employee was calculated with reference to the fees invoiced by him. In that case, the order is reinstated to the extent that his remuneration exceeded the amount attributed to the reduced fee of $2,500.

*Costs*

[114] There is no reason to depart from the Committee's order for payment of costs of $500.

*Apology*

[115] At paragraph [35] of its determination, the Committee referred to an apology to be provided to Ms EO. No formal order for Mr FN to apologise was made by the Committee.

[116] Ms EO did not seek an apology and there is little value to be had at this stage from an ordered apology.

[117] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Committee is modified to reverse the reference to an apology.

**Decision as to penalty orders**

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

1. The censure by the Committee is reversed.

2. The fine of $5,000 ordered by the Committee is increased to $ 7,500.

3. The order for payment of costs in the sum of $500 is confirmed.

4. The order to reduce the invoice (reference [redacted]) is modified in the manner referred to in [111] of this decision.

**Costs of review**

[119] The finding of unsatisfactory conduct against Mr FN has been confirmed on review. Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006 and the Costs Orders Guidelines issued by this Office, Mr FN is ordered to pay the sum of $1,600 by way of costs to the New Zealand Law Society.

**Enforcement**

[120] Pursuant to s 215 of the Act, I confirm that the orders for payment of money made in this decision, are enforceable in the civil jurisdiction of the District Court.

**Publication**

[121] Notwithstanding my reversal of the censure by the Committee, thereby removing the option for the Committee to publish its determination, including Mr FN' identity, I have given consideration as to whether this decision should be published.

[122] Section 206(4) enables a Review Officer to direct publication of a decision as is considered to be necessary or desirable in the public interest.

[123] Whilst it may be considered necessary or desirable in the public interest to alert the public to Mr FN' disciplinary history, the conduct complained about by Ms EO arises out of the particular facts of the matter on which Mr FN was engaged when acting for [Company B]. These facts are unremarkable and to the extent that publication of this decision would not otherwise be considered necessary.

[124] Mr FN has now established his own firm. I am not aware if Mr FN' firm has a time recording programme, or continues to invoice on a fixed fee basis at the commencement of a retainer, but I urge Mr FN to take note of the comments in this decision about those practices. I also trust that Mr FN recognises the need to comply carefully with the requirements of rr 3.4 and 3.5 of the Conduct and Client Care Rules, and to report regularly to his clients.

[125] In the circumstances, in this instance, there will be no publication order other than the anonymised publication ordered in [126] of this decision. However, Mr FN needs to bear in mind that the public will need to be advised if there are further disciplinary findings against him.

[126] Pursuant to s 206(4) of the Lawyers and Conveyancers Act 2006, I direct that this decision be published in an anonymised format on the website of this Office.

**DATED** this 31ST day of OCTOBER 2023

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**O Vaughan**
**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 FN as the Applicant
Ms EO as the Respondent
Mr TX as a Related Party
[Area] Standards Committee [X]
New Zealand Law Society