LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2024] NZLCRO 013

Ref: LCRO 154/2023

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**FH and NH** Applicants
AND	**WA, BF and DT LIMITED** Respondents

DECISION

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

Introduction

[1] The applicants have applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of their complaint primarily about the conduct of the first two respondents, Ms WA and Ms BF.

[2] The applicants, Mr NH and Mrs FH, are two of four trustees of the H Family Trust (the trust). The other two trustees are the applicants' son, Mr QH, and an independent trustee, Mr XC.

[3] There was a degree of confusion in the complaint materials and in the application for review as to whether the complainants were the four trustees or just Mr NH and Mrs FH. The other two trustees appeared to have played no active part in

bringing the complaint and the review application. I formed the view that Mr NH and Mrs FH were the only complainants and issued a minute to clarify the matter.

[4] The complaint related to the conduct of the [City]-based incorporated law firm, DT Limited (the firm), in litigation for the trust. Ms WA is a director of the firm. Ms BF is an employed lawyer at the firm.

[5] The complaint was also made by the applicants and processed by the New Zealand Law Society Lawyers Complaints Service (NZLS) against Mr RW. Mr RW is the firm's General Manager. For the reasons stated later in this decision, I substituted the firm for Mr RW as respondent.

Background

[6] The trustees owned a residential property in [City] in which the applicants lived. The property was damaged in the [City] earthquakes in [redacted].

[7] The trustees engaged initially with the Earthquake Commission (EQC) in relation to the earthquake damage. That process continued until mid-2016. From 2015 onwards, they engaged with their insurer in relation to their claims under their insurance policies.

[8] In September 2016, the insurer cancelled the policies then in place prospectively (i.e. going forwards) on the grounds that the applicants had made fraudulent contents claims against EQC.

[9] In December 2016, the insurer purported to avoid (retrospectively cancel from the beginning) all the policies in place between 2003 and 2015 for alleged material non-disclosure of various matters. These included non-disclosure of the correct floor area, alleged construction defects, the condition of the house (including previous unrepaired damage) and a previous declined material damage claim.

[10] The issue of non-disclosure relating to the floor area arose because the house was, according to the records on which the insurer sought to rely, insured on the basis of a floor area of 200m2 including a separate garage, which the insurer said was less than 40 per cent of its actual floor area of "over 500m2".[1] The applicants' house did not have a separate garage.

[1] This figure was disputed. The trustees' quantity surveyor subsequently calculated the floor area at 440m2.

[11] The central dispute was whether the incorrect floor area in the insurer's records was the result of intentional non-disclosure by the trustees or an administrative error by the insurer involving the loss of its records and their reconstruction mistakenly using records relating to a different property owned by relatives of the applicants with the same surname and first initials, which was 200m2 including a separate garage, and then whether or not the applicants knew of the insurer's error and failed to correct it.

[12] In July 2017, the trustees instructed the firm to assist them in pursuing their claim. Correspondence ensued with the insurer. The claim was not resolved. In July 2018, the firm issued court proceedings on behalf of the trustees against the insurer. The insurer maintained its reliance on having validly avoided the policies.

[13] Also in 2018, the trustees engaged the services of a Ms VG, who filled the dual roles of their quantity surveyor and claims manager.

[14] On 1 April 2019, the formerly unincorporated firm became an incorporated firm.

[15] Payment of the firm's fees became an issue. In August 2019, an arrangement was reached for the trustees to pay $500 per week until the claim was settled. Payments were haphazard. On two occasions, the firm advised it would not be able to continue to act and the trustees responded by making payments. The firm continued to act.

[16] In mid-2020, the parties agreed to determine the issue of the validity of the insurer's avoidance of the policies as a separate issue. The matter was set down for hearing. The significance of this was that if the insurer succeeded on the issue, the trustees would have had no claim at all. If the trustees succeeded, a further hearing would be required to determine the scope of required repairs and their cost, including various professional fees and other sums properly claimable under the policy.

[17] Shortly afterwards, in August 2020, the insurer formally reversed its avoidance of the policies and made a "without prejudice" settlement offer. In doing so, it expressly reserved its position as to whether avoidance of the policies was warranted, in the event that settlement was not achieved.

[18] The firm recommended that the applicants make a counteroffer and sought instructions from them.

[19] The applicants were particularly focused on the costs (of various kinds) they had incurred during the five years of attempted resolution of their claim and the legal dispute over the policy avoidance. Their position on the legal costs was that, in their view, the insurer had "capitulated on" and apologised for its prior position regarding its

avoidance of the insurance policies and should therefore pay all their actual legal costs to that date, including their costs prior to issuing proceedings, and their legal costs from September 2020 onwards on a scale 2B basis.

[20] Costs "on a 2B basis" or "on a scale 2B basis" is a reference to the scale Court costs awarded against an unsuccessful party in a standard High Court civil claim. Category 2 applies to "proceedings of average complexity requiring counsel of skill and experience considered average in the High Court". Band B is applicable where "a normal amount of time is considered reasonable" for a specified step in the proceedings.

[21] The insurer's settlement offer was not accepted and either lapsed or was declined, although it was later repeated on two occasions.

[22] Between August 2020 and February 2021, there was extensive correspondence from the firm to the trustees, also involving Ms VG, by which the firm sought to get instructions from the trustees on a proposed counteroffer to make to the insurer.

[23] Ultimately, no counteroffer was made. One of the matters in dispute in the complaint is whether or not such instructions were ultimately given and not acted upon by the firm.

[24] In the meantime, the trustees and the firm moved on to obtaining the necessary experts' reports. The parties' respective engineering experts conferred and produced a joint expert report. The trustees proceeded to quantify their claim for repair costs. The insurer did likewise.

[25] Throughout the negotiations, the applicants were heavily reliant on the advice of Ms VG, whose involvement was material, resulting in a claim by the trustees for a substantial sum for her fees.

[26] A judicial settlement conference (JSC) was held in July 2022, five years after the firm had first been instructed and four years after proceedings had been issued. Witness "will-say" statements were prepared for the purposes of the JSC.

[27] For the purposes of achieving a settlement at the JSC, the insurer put aside in advance the arguments about alleged construction defects and pre-existing damage so that the principal argument was about the scope and cost of repair.

[28] The insurer did not put aside the floor area issue in advance of the JSC. According to the respondents, however, it did so in its opening statement on the day so that the negotiations proceeded on the basis of the cost of repair of the total floor area.

The applicants and Ms VG have a different understanding of this matter, as discussed later in this decision.

[29] The Judge conducting the JSC allowed Ms VG to participate in her expert witness capacity i.e. as a quantity surveyor but not as an advocate or representative. He told her to "stay in your lane". The applicants and Ms VG found this frustrating.

[30] At the JSC, the applicants accepted a settlement offer from the insurer of $90,000 more than it had previously offered (three times).

[31] The applicants were dissatisfied with the JSC process and the settlement outcome. They considered that they had been poorly advised before, and poorly represented at, the JSC and in particular that they had been prejudiced by Ms VG's inability to advocate for them and dispute the evidence of the insurer's expert witnesses.

[32] Following the settlement, the firm sought payment of its outstanding fees in full by 5 October 2022. The outstanding fees had been invoiced during the period after the firm incorporated. Earlier fees had been paid.

[33] The applicants filed a complaint against the respondents with the New Zealand Law Society Lawyers Complaints Service (NZLS) by email on 4 October 2022. The NZLS acknowledged receipt but did not notify the firm of the complaint at the time.

[34] The firm filed and partially served court proceedings for the recovery of the outstanding fees in late November 2022. The applicants forwarded copies of the documents that had been served on them to the NZLS on 23 November 2022 and stated their understanding that the firm could not take this action while there was an outstanding complaint.

[35] The firm says it was first advised of the complaint by email from the NZLS on 25 November 2022. This email is not on the Committee's file provided to the LCRO's office but I infer it included a request for the firm's time and attendance records as there is an email from Ms WA to the NZLS providing those records on 1 December 2022. The formal notification letter from NZLS to the firm is dated 14 December 2022.

The complaint

[36] In the manner the overall complaint was presented by Mrs FH on behalf of the applicants, there were five discrete elements to it. Four of them related to the firm's management of the litigation process in general and the JSC in particular and were made

variously against Ms WA and/or Ms BF. The fifth element was a complaint of discourtesy against Mr RW.

[37] I will summarise each element of the overall complaint as presented by Mrs FH and the firm's response to that element.

Complaint No. 1

Part One

[38] Complaint No. 1 focused on the dispute with the insurer over the floor area and was made solely against Ms WA. It was expressed in two parts.

[39] "Part one" of Complaint No. 1 was expressed as a claim of professional negligence. It was that Ms WA failed to advise the trustees to apply for a separate court hearing of the "separate legal question" of the dispute over the floor area and failed to have that separate question definitively determined and resolved prior to the JSC.

[40] The applicants considered that this influenced the insurer's perception of the amount of a fair settlement offer and put them at a negotiation disadvantage at the JSC. They considered that Ms WA was negligent in her representation of them in this regard.

[41] Ms WA's position is that the insurer sought to have the issue of the validity of its avoidance of the policies dealt with as a separate question, the trustees were initially opposed to the idea, it was eventually agreed to pursue that course of action and, in June 2020, the policy avoidance issue was set down for hearing in June 2021.

[42] She says that, in August 2020, the insurer reversed its avoidance of the insurance policies, advised the Court that the hearing of the separate question would no longer be required and advised that it wished to move swiftly to resolve the earthquake claim without the assistance of the Court if possible.

[43] According to Ms WA, the various settlement offers from the insurer from that point were all made without any deduction by reason of the floor area issue. She says that, in any event:

(a) the floor area issue would not have been suitable for determination as a separate legal question as it would not have been determinative of the whole proceeding;

(b) if the issue had been determined as a separate legal question and the trustees had been unsuccessful, they would have been definitively left

> negotiating on the basis of 32-40 per cent, rather than 100 per cent, of the repair cost and their maximum claim would therefore have been substantially less than it was.

Part Two

[44] "Part two" of Complaint No. 1 relates to essentially the same issue but in the context of the JSC.

[45] The trustees went to the JSC armed with a costing prepared by Ms VG comprising claims for earthquake repair costs, professional advisory fees and claims preparation costs of almost $500,000 in total more than the insurer's offer. The total figure excluded legal fees.

[46] The applicants say that because the floor area issue had not been definitively resolved by the Court before the JSC, it remained a live issue that the insurer could, and did, threaten to use in the settlement negotiations. They say that Ms WA failed to address the floor area issue, failed to rebut the suggestion from the insurer that the floor area remained a live issue and failed to draw attention to the fact that the insurer had abandoned the issue two years earlier.

[47] They say that the figure they agreed to settle at was two fifths of their total claim including legal costs and (paraphrased) that they were unable to negotiate for a greater sum because Ms WA's failure to rebut the insurer's position on the floor area issue prevented them from doing so.

Complaint No 2

[48] Complaint No. 2 is also against Ms WA and is expressed as one of negligence. The applicants say that, following the insurer's "capitulation" on its purported avoidance of the policies, they formed the view that they were entitled to claim from the insurer the full amount of all their legal costs to that point and that they specifically directed Ms WA to seek "full compensation for these legal costs" from the insurer.

[49] They say that Ms WA failed to act on those instructions. They express this in terms of Ms WA being negligent in not:

> … follow[ing] through on our very clear and concise written request, which should have opened a specific dialogue/negotiation between the 2 legal parties around those 5 years of the total fees inclusive of legal fees incurred to eventually arrive at an agreed settlement.

[50] Ms WA says, in summary, that:

(a) she spent six months between September 2020 and February 2021 trying repeatedly and unsuccessfully to get instructions to make a counteroffer;

(b) in February 2021, Mrs FH finally sent through some information as to what a proposed counteroffer might look like;

(c) the proposed counteroffer required the insurer to pay immediately a sum for professional advisory costs alone that was just $17,000 less than the insurer's total offer with the repair cost and associated experts' fees to be settled separately in addition to that sum;

(d) the insurer's offer on legal costs at that time was to pay 2B scale costs of $19,882 as part of its total settlement offer;

(e) the firm considered that the timing of Mrs FH's proposed counteroffer "was not optimal from a strategic perspective" and advised the applicants that they were best to wait until receiving the engineer's report and that if the applicants wished to make a counteroffer at that time, they should discuss the matter further;

(f) Mr NH gave express instructions to "… hold a counteroffer in abeyance at the moment until it is agreed that the timing is more appropriate";

(g) no subsequent instructions were received to make a counteroffer;

(h) the settlement sum agreed at the JSC included an amount for costs.

Complaint No. 3

[51] Complaint No. 3 is against Ms BF and is again one of negligence. The applicants say (in summary) that:

(a) during the JSC, the Judge asked "what are your clients' legal fees?";

(b) Ms BF's answer was that they were approximately $80,000;

(c) this was the outstanding balance owing to the firm at the time but not the whole amount billed since the firm was first instructed in 2017;

(d) "Court rules allow for application of part 2B for compensation of all legal fees incurred";

(e) Ms BF's answer to the Judge jeopardised the trustees' opportunity to achieve full reimbursement of substantially all legal fees incurred.

[52] Ms WA, on behalf of Ms BF, says (in summary) that:

(a) the discussion about fees was over the lunch break (i.e. did not involve the Judge) and the context was "working out what to offer as a settlement figure, and what the [trustees] would ideally need to recover to fix the house and to pay off outstanding costs";

(b) if such a figure was mentioned (which Ms BF did not recall), it related to fees already invoiced at the time plus an estimate of the costs of the JSC and that month's additional work;

(c) the insurer had previously offered $19,882 as 2B costs and would only ever have paid 2B costs;

(d) Ms WA's file note from the JSC includes a page of calculations in the Judge's handwriting which records "25" for 2B costs (presumably implying that an estimated $25,000 might have been an appropriate sum);

(e) the applicants misunderstand the concept of 2B court costs despite it having been explained to them on several occasions;

(f) the trustees would only ever have been entitled to 2B costs, not their total legal costs.

Complaint No. 4

[53] Complaint No. 4 is against Ms BF and is also one of negligence, this time in preparation of Ms VG's will-say witness statement for the purposes of the JSC.

[54] The applicants say (in summary) that:

(a) Ms BF incorrectly completed the will-say statement describing Ms VG only as a quantity surveyor and not also as their claims manager;

(b) as a consequence, the Judge told Ms VG to "stay in your lane" as a quantity surveyor and did not allow her to advocate for the trustees in her capacity as their claims manager;

(c) the presentation of the factual aspects of their claim was therefore compromised and "… enabled [the insurer] to downgrade the presentation of the level of repairs required as [Ms VG] was unable to contest the facts";

(d) Mrs FH was in hospital at the time did not have any input or oversight of what had been prepared.

[55] Ms WA, on behalf of Ms BF, says (in summary) that:

(a) the will-say statement did describe Ms VG as a "claims manager" as well as a quantity surveyor;

(b) the insurer's lawyers specifically asked Ms BF to advise whether Ms VG would be attending the JSC as a "claims advocate", as that was their understanding of her role;

(c) Ms BF passed that query on to Ms VG;

(d) Ms VG responded in writing stating expressly "I am not a claims advocate. I am a claims manager and quantity surveyor";

(e) Ms VG approved and signed the will-say statement containing that description;

(f) Ms VG was an expert witness, consequently independent and Mrs FH would not have been entitled to have any input or oversight of what her will-say statement said;

(g) nevertheless, the applicants received a copy of the will-say statement five days before Mrs FH was taken to hospital;

(h) the applicants have misunderstood Ms VG's role at the JSC, which was to give expert evidence of the cost of repair, not the scope of repair, which was the reason for the Judge's comment.

[56] Ms VG says, relevantly, that:

(a) she felt "blindsided by the Judge, who I believe, focused only on the fact that I was a quantity surveyor not a claims manager";

(b) the Judge did not allow her to ask questions of the insurer's engineer, builder or lawyer;

(c) she understood that the parties were “not in a formal court room” and that she had “attended mediation many times before and have always been able to speak and ask questions of the other party, especially having the most knowledge of the insurance claim”;

(d) her inability to speak "was frustrating and stopped the [trustees] from reaching a satisfactory settlement”;

(e) she was unsure if the will-say statement caused that or not.

Complaint No. 5

[57] I interpret Complaint No. 5 as also being in two parts. Initially, the applicants complained that the firm’s letter signed by Mr RW requiring payment of the outstanding fees was discourteous (or in their words, “heavily intimidating”). Secondly, Mrs FH’s comment about her understanding that the lodging of the complaint precluded the firm from taking further action to recover their outstanding fees could be interpreted as a complaint of breach of s 161 of the Lawyers and Conveyancers Act 2006 (the Act).

[58] The firm’s position is that there was nothing discourteous about the letter requiring payment of the outstanding fees and that the complaint is not a fees complaint.

Outcomes sought

[59] As outcomes of their complaint, the applicants sought:

(a) in respect of Complaint No. 1, compensation of the difference between the settlement amount received from the insurer and the amount that “ought to have been paid if the [floor area] issue had been resolved in a timely manner”;

(b) in respect of Complaints Nos. 2 and 3, compensation for “… for the full amount of the fees incurred …” with that amount to be “… used as an offset to the outstanding balance of fees”;

(c) in respect of Complaint No. 4, compensation of the difference between the settlement amount received from the insurer and the amount that ought to have been paid if the will-say statement had been drafted in such a way as to authorise Ms VG to speak on the trustees’ behalf at the JSC;

(d) censure of Ms WA and Ms BF;

(e) compensation for "…hardship, stress and frustrations incurred…" as a result of the relevant respondents' alleged negligence and failings.

The Standards Committee decision

[60] The Standards Committee delivered its decision on 13 September 2023. It determined, pursuant to s 138(2) of the Act, that further action on the complaint was neither necessary nor appropriate.

[61] In reaching that decision the Committee determined that the issues for its consideration were:

(a) whether the respondent lawyers had met the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent solicitor and in particular whether the firm's overall litigation strategy and its approach at the JSC were appropriate;

(b) whether the firm responded to the complaint appropriately including filing proceedings for recovery of its outstanding fees.

[62] In relation to Complaint Nos. 1 and 2, the Committee found that the floor area issue had no bearing on the settlement achieved because that issue, as well as the issue of whether damage arose because of construction defects rather than the earthquakes, was put aside by the insurer at the JSC.

[63] It found that this meant that the parties engaged on the disputed aspects of repair scope and cost on the assumption that full policy coverage was available. The issue of strategy as to whether the floor area issue should have been determined as a separate legal issue therefore had no bearing on the outcome at the JSC.

[64] The Committee found there was no merit in Complaint No. 3 because all offers, including at the JSC, were premised on the insurer paying a maximum of 2B scale costs as is routinely the case.

[65] Regarding Complaint No. 4, the Committee found that the applicants had misunderstood the difference between an expert witness and an advocate. It considered that Ms VG could not act as the trustees' advocate or claims manager without undermining her expert evidence as to the repair costing on which the trustees' claim relied. It considered that the distinction could have been better explained by the firm but that no professional conduct issue arose as a result.

[66] The Committee also found no merit in Complaint No. 5. It considered that the firm's initial letter requiring payment was not intimidating, it was entitled to take steps to recover the outstanding fees, no complaint had been made until after the firm filed proceedings and the firm took no further recovery steps after the complaint was made.

Application for review

[67] The applicants filed an application for review dated 31 October 2023 initially without specifying any grounds for review. Grounds were eventually provided in January 2024.

[68] In relation to complaint Nos. 1 and 2, the applicants focused on the fact that they had agreed at the JSC to settle with the insurer. They argued that this decision was made "… under extreme duress given the issue of the house floor size remained unresolved". They referred to their poor health condition, Mrs FH having suffered strokes and Mr NH having had PTSD apparently as a result of his experiences in the years spent pursuing claims with EQC and the insurer.

[69] Principally, however, they explained that the "greatest duress" was the combination of the financial risk of going to trial at an estimated cost of another $150,000 and the risk of being unsuccessful at trial and then being liable for a costs award in favour of the insurer.

[70] I interpret the references to "duress" as a development of the comments the applicants had made in their original complaint about the risks of not settling at the JSC. In their complaint, they recorded their understanding that a trial would be another two years away and would be set down for a two-week hearing.

[71] In relation to Complaint No. 3, the applicants argued that if Ms BF had told the Judge at the JSC the correct figure for their total legal costs since the firm was first engaged, they could have expected to recover between $120,000 and $135,000 for costs on a 2B basis in addition to the house repair costs and their other claims.

[72] In advancing that argument, their understanding appears to have been that a successful party recovers 75 per cent to 80 per cent of actual, total legal costs (both before and after the issue of proceedings) in a 2B scale costs award. The issue was again argued to be an example of "gross negligence" on Ms BF's part.

[73] The applicants also added a further particular to their complaint. They said that the firm had never advised them that they were entitled under their policy to recover all professional fees incurred in pursuing their insurance claim including "…all our

engineers, builders and other relevant costs…" and Ms VG's fees, and that both Ms WA and Ms BF were "massively silent" on this aspect of settlement at the JSC.

[74] On review, the applicants also raised an entirely new issue about their complaint having been determined by a standards committee in the same city as the applicants and the firm. They said that they had expected the complaint to be considered "… in a location and with members of the review panel that had no likelihood of prior association in a social or any other capacity or manner to keep out any potential collusion [and] to maintain a high level of independence, integrity and oversight of the complaint".

[75] In addition, the applicants appeared to suggest that existing relationships between the firm and the insurer's lawyers might have influenced the decision to proceed to a JSC rather than "…mediation or some [alternative] pathway that allowed for … contentious issues raised at the time of the JSC hearing to be resolved in person and ahead of any potential offers of settlement from [the insurer]".

[76] The applicants made various comments about their bill payment arrangements and an attempt to obtain financial support from WINZ. These comments did not appear to be relevant to their complaint or the review application.

[77] The applicants then complained that the one-day JSC format created undue time pressure to settle as compared with potential alternatives such as mediation, "other insurer tribunals" and "potentially alternative options". This additional complaint aspect on review seemed to be prompted partly by the applicants' comment that Ms VG was not familiar with the JSC process and might have had a greater influence on the presentation of their arguments in a different and less time-constrained process.

[78] Mr NH presented a separate submission essentially repeating some of Mrs FH's main points. He stated, in summary, that:

(a) Ms WA's and Ms BF's advocacy in the applicants' interests was inadequate in the JSC. He asserted specifically that Ms WA had said "we were there only to take notes".

(b) The firm "sabotaged the whole process by not addressing the extremely large 'elephant in the room' and this is the matter of the floor area of our home".

(c) Ms WA's failure to ensure that Ms VG could participate in the JSC as a "witness of fact" as well as a quantity surveyor was "… a gross betrayal of

trust and indicative of a lack of professionalism and an inability to represent her client effectively";

(d) The firm acted "without regard to the client but acted irresponsibly and negligently";

(e) The review should be undertaken outside the [Region] "to ensure there is no question of undue influence".

[79] In her summary submission on review, Mrs FH focused on:

(a) what she described as Ms WA's failure to make the applicants aware in advance of the JSC that Ms VG could not participate as a "witness of fact" as well as a quantity surveyor;

(b) a general failure by the firm to represent the applicants adequately both before and at the JSC;

(c) Ms WA's alleged failure to present Mrs FH's proposed interim settlement proposal to the insurer, which she linked with the alleged issue of failing to have the floor area issue resolved.

[80] Mrs FH maintained her request for compensation to be ordered of the difference between the settlement amount received from the insurer and the sum calculated by Ms VG representing the applicants' opinion of the house repair costs plus all their professional fees incurred in pursuing their claims. The difference was, in round figures, $600,000.

[81] An aspect of the complaint and review application I have not previously mentioned is that the applicants seek payment of compensation either from the firm or from the Lawyers' Fidelity Fund.

[82] My understanding is that the outcomes sought by the applicants on review remain:

(a) a finding that Ms WA and Ms BF have been negligent in the various ways specified by the applicants and Ms VG;

(b) an order for compensation to be paid by way of writing off the whole of the fees charged to them by the firm and ordering the amount already paid to be refunded;

(c) further compensation representing the difference between the settlement sum agreed with the insurer and Ms VG's calculation of their maximum potential claim, less the legal fees ordered to be written off and/or refunded, such compensation to be paid by the firm or by the Lawyers' Fidelity Fund;

(d) censure of Ms WA and Ms BF;

(e) an additional sum for compensation for "…hardship, stress and frustrations incurred…" as a result of the relevant respondents' alleged negligence and other failings.

[83] The respondents were invited to comment on the applicants' review application. They largely relied on their submissions to the Committee and objected to new matters being raised on review. Additionally, they stated that (paraphrased):

(a) the decision to settle (or not) at the JSC was always that of the trustees and the applicants had the in-person support on the day of their adult son and co-trustee as well as Ms VG and their engineer and builder;

(b) the offer they accepted included a sum for professional fees;

(c) the settlement obtained was an "out of policy" settlement;

(d) once litigation had commenced, professional fees incurred in respect of the litigation were at the discretion of the Court rather than being an entitlement under the policy;

(e) they did not accept that a mediation had the potential to continue for two to three days, as the applicants had suggested;

(f) as with a mediation, a resolution could be reached at a JSC only if both parties agreed.

Review on the papers

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

[85] After undertaking a preliminary appraisal of the file, I formed the provisional view that this was the most appropriate method of conducting the review and gave the parties opportunity to comment, as required by s 206(2A) of the Act. Neither party objected.

[86] I issued two minutes in which I:

(a) directed the applicants to advise their grounds for review by a specified date (twice);

(b) made clear that an application for review is not an opportunity to make new complaints or produce new evidence;

(c) noted that the application was being pursued by the applicants in their capacity as trustees of the trust and sought confirmation that the independent trustee was aware of the application;

(d) directed the respondents to advise whether or not they had been served in their court proceedings with pleadings alleging negligence and/or disputing the amount of their claim.

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

Nature and scope of review

[88] 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

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

> 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.

[89] 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 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.

[90] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to consider all of the available material afresh, including the Committee's decision, and provide an independent opinion based on those materials.

Preliminary issues

[91] There are several matters I need to make clear to the applicants before setting out the issues to be determined on review, as it is clear to me that the complaint and now the review application have been pursued on the basis of some odd stated understandings of legal and procedural matters.

Committee independence

[92] The first matter relates to the independence of the Committee. I will explain standards committee membership and processes for the applicants' benefit.

[93] Although the NZLS provides standards committees with administrative support, a standards committee is not part of the NZLS. It is an independent body whose members, all of whom are volunteers, are appointed pursuant to the Act.

[94] There are about 16,000 practising lawyers in New Zealand. Fewer than 150 of them are members of lawyers' standards committees at any one time. A branch committee normally comprises five lawyer members and two lay members. In this instance, the relevant branch has 1,767 members, so 0.28 per cent of them are standards committee members.

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

[95] The possibility of a connection between such a member and a party to a complaint is remote.

[96] Where any committee member (whether lawyer or lay) does have a personal or professional connection of some kind with a complaint party, the member recuses himself or herself as a matter of course and the recusal is recorded in the committee's meeting minutes.

[97] A recused member normally leaves the committee room while the particular matter is discussed and is recalled to the room once the committee moves to the next item on its agenda. In addition, the recused member does not receive the written materials relating to the complaint as it proceeds through the committee process.

[98] A quorum for making a committee decision is five members. This ensures that any member can recuse himself or herself from participating in discussion of that complaint without affecting the ability of the committee to conduct its business.

[99] In summary, the standard procedures and protocols to ensure the independence and integrity of standards committee decision-making are clear and robust. The applicants' suggestion of possible "collusion" between the respondents and the Committee is fanciful.

Lawyer independence and objectivity

[100] The related suggestion by the applicants that the firm might have been influenced in its advice to them on the procedural aspects of the pursuit of their claim against the insurer by the firm's or the respondents' professional connections with the lawyers for the insurer – or rather their assumed connections from the fact of both firms being headquartered in the same city – is even more fanciful.

[101] Lawyers acting on civil Court claims practise law in an adversarial environment. Every Court claim of a similar nature is a contest. It is part and parcel of lawyers' professionalism that they advocate fearlessly for their clients' interests while maintaining professionally appropriate communications and connections with other lawyers practising in the same field. The other party's lawyer is both one's opponent and one's professional colleague. There is nothing unusual or objectionable about this.

[102] I have no information as to whether Ms WA and/or Ms BF had ever had any previous professional engagement with the lawyers for the insurer. Nor, presumably, do the applicants. Either way, the applicants' expression of suspicion is not presented with any factual foundation and is irrelevant to this review.

[103] For completeness, I am not based in [Region] and none of the named lawyers are known to me.

Lawyers' Fidelity Fund

[104] The third matter relates to the applicants' claim for compensation from the Lawyers' Fidelity Fund, albeit as an alternative to compensation from the firm for its alleged shortcomings. The Fidelity Fund exists to compensate clients for money stolen from them by their lawyer. It is not a general fund from which compensation can be paid to people who consider their lawyers have been negligent or have failed to follow instructions or otherwise been allegedly deficient in their advice or service.

Jurisdiction under the Act

[105] A standards committee is not a substitute for a court of law. It is a professional disciplinary body. Its function is to determine whether or not there has been any lapse by the lawyer(s) in professional standards of conduct prescribed under the Act and in rules and regulations made under the Act, which include the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[106] Although a standards committee has the power to impose a range of penalties where it determines there has been a lapse of professional standards, including the power to order a lawyer to pay compensation where a person has suffered loss by reason of any act or omission of the lawyer, it has no jurisdiction to award damages for alleged breach of any civil law duty owed by a practitioner to the complainant.

[107] An allegation of professional negligence is an allegation of breach of a duty owed by the lawyer under the civil law.

[108] Compensation can only be awarded under the Act for loss that is demonstrated to have resulted from the lawyer's act or omission in breach of professional standards. Loss can include emotional harm. The maximum compensation that can be awarded, assuming there are grounds for compensation to be awarded, is $25,000.

[109] A related point is that a standards committee's power to award compensation under the Act is separate from its power to order either a reduction of fees and/or a refund of fees where a complaint is made about the fees charged by a lawyer for legal services and the fees are found not to be fair and reasonable to both parties.

[110] The same jurisdictional restrictions apply to me on review of the Committee's decision. In summary:

(a) I can make a finding of breach of a professional duty but not of breach of a civil law duty;

(b) consequently, I cannot award damages for breach of a civil law duty;

(c) I can order a reduction or refund of fees if a fees complaint is made and I find that the fees charged by the firm were not fair and reasonable to both parties;

(d) to receive compensation, the applicants must establish that they have suffered loss, which can include emotional harm, resulting from breach of a professional duty;

(e) the maximum compensation I can award is $25,000.

Findings not binding on a Court

[111] The jurisdiction of a Court is separate and distinct from the jurisdiction of a standards committee or the LCRO under the Act. I mention this for two reasons.

[112] The first is that a Court is not bound by any finding of fact by a standards committee or review officer, and vice versa. Therefore if, hypothetically, I were to find on the information available to me that either of the first two named respondents had failed in some respect to meet the standard of competence and diligence that a member of the public is entitled to expect from a reasonably competent lawyer, this would not mean that a Court would be bound to find that she had been guilty of professional negligence.

[113] To put the matter simply, making a professional conduct complaint to the NZLS is not a cost-free way of establishing professional negligence.

[114] The second reason is that any finding of breach of professional duty I might make, even if accompanied by an award of compensation for emotional harm or other established loss, would not oblige a Court to find that the acts or omissions of the lawyer were the cause of any financial loss they claim to have suffered.

[115] The applicants face the obvious and unavoidable problem that they agreed a settlement sum with the insurer. They have clearly had second thoughts about the wisdom of that course of action.

[116] Again putting the matter simply, if the applicants now wish to establish either that:

(a) their will was overborne in some way when they entered into the settlement agreement; or

(b) they were forced or persuaded to enter into the settlement agreement because of negligent advice or representation by the respondents; and

(c) in either case, they would have been entitled at law to recover several hundred thousand dollars more (ignoring the legal costs aspect) from the insurer but for their will being overborne or the respondents' negligence,

they need to go to Court to do it.

[117] The Court is the proper place for such a claim. The Court process involves the clear articulation by way of pleadings of the factual issues in dispute, disclosure of all relevant documentary material, the examination and cross-examination of witnesses under oath and consequently a basis for making findings of credibility, the accurate quantification of alleged loss, the identification of relevant legal issues including whether the claimed loss was caused by the alleged negligence, and the argument of all those issues before a Judge.

[118] The firm has issued District Court proceedings against the trustees. If the trustees collectively support the applicants' allegations of negligence, the proper avenue to pursue the matter is by way of counterclaim in those court proceedings or a separate claim in the High Court (as District Court jurisdiction is limited to $350,000).

[119] I am nevertheless obliged to deal with the review on the basis of the particulars of the complaint that was made to the NZLS and the information available to me. I will proceed to do so.

No jurisdiction over non-lawyers

[120] The last preliminary matter is that Mr RW has never been a practising lawyer. I have issued a minute regarding this matter but repeat the position here. The Act and the Rules apply to the conduct of lawyers. I therefore have no jurisdiction to consider the conduct of Mr RW personally.

[121] I nevertheless consider that Mr RW's letter to the applicants requiring payment of outstanding fees was sent in his capacity as authorised representative of the incorporated law firm. The complaint in this respect properly lay against the firm, not against Mr RW personally.

[122] The same considerations apply to the issue of whether the applicants have made a fees complaint and, if so, the possible breach of s 161 of the Act. The fees were billed by the firm. The proceedings were issued by the firm.

[123] I will therefore deal with those aspects of the complaint on the basis that they are complaints against the firm.

Issues on review

[124] The issues for consideration on review are as follows:

(a) What relevant professional duties did Ms WA and Ms BF owe to the applicants?

(b) Did Ms WA breach any professional duty in not having the floor area issue resolved before the JSC?

(c) Did Ms WA breach any professional duty in respect of her advice to the applicants to proceed to a JSC and/or about the nature of the JSC process?

(d) Did Ms WA or Ms BF breach any professional duty in not communicating a counteroffer to the insurer's lawyers?

(e) Did the floor area issue affect the outcome of the JSC?

(f) In relation to the floor area issue, is there evidence of any breach of professional duty on the part of Ms WA?

(g) In relation to the legal costs issue, is there evidence of any breach of professional duty on the part of Ms BF?

(h) In relation to the issue of Ms VG's will-say statement, is there evidence of any breach of professional duty on the part of Ms BF?

(i) Is there evidence of any breach of professional duty by the firm in failing to advise the applicants that they were entitled under their policy to recover all professional fees incurred in pursuing their insurance claim?

(j) Did the firm's letter to the applicants requiring payment of outstanding fees constitute breach of any professional duty owed by the firm to the applicants?

(k) Has there been a fees complaint?

(l) If so, has the firm breached s 161 of the Act?

(m) Also if so, has the fees complaint been properly addressed by the Committee and, if not, what action should I take?

Discussion

(a) What relevant professional duties did Ms WA and Ms BF owe to the applicants?

[125] Rule 3 of the Rules provides that:

> 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.

[126] The Committee expressed the resulting primary issue as whether the firm met the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent solicitor in acting for the trustees in respect of their earthquake claim.

[127] The client in this instance was the trustees collectively rather than just the applicants but nothing turns on this. My concern was only to know whether the named independent trustee remained a trustee and was aware of the review application.

[128] Much of the complaint focuses on the events leading up to and during the JSC. My understanding from the materials is that the independent trustee did not participate but consented to the JSC proceeding without him being present. I presume he was a party to the resulting settlement agreement (which is confidential and accordingly has not been disclosed).

[129] Another relevant duty, in relation to Complaint No. 2, is the duty to follow a client's instructions. This has regulatory expression in r 13.3 of the Rules, which provides as follows:

> Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them.

(b) Did Ms WA breach any professional duty in not having the floor area issue resolved before the JSC?

[130] I emphasise, and will keep emphasising, that any comments I might make cannot determine whether Ms WA was professionally negligent in her advice to trustees. A judge might have a different view from mine.

[131] The issue the applicants have focused on is the floor area issue, the consequent allegation by the insurer of material non-disclosure and the resulting avoidance of the policies.

[132] The immediate problem is that there is a fundamental difference of understanding between the applicants and Ms WA about the significance of the issue of the disclosed floor area to the settlement outcome.

[133] In July 2019, the lawyers for both parties filed a joint memorandum for a case management conference in which, relevantly, they sought "…a split trial, with the separate question of whether [the insurer] was entitled to avoid the policy being heard first under HCR 10.15".

[134] The Judge deferred setting down the separate question for hearing until discovery had been completed. There was significant delay by the applicants in completing discovery, compounded by their non-payment of the firm's fees and advice from the firm on several occasions that it would withdraw from acting further for that reason. The separate question was eventually, in June 2020, set down for hearing.

[135] In August 2020, the insurer formally reversed its avoidance of the 2010 and 2011 home and contents policies, although not conceding that policy avoidance was unwarranted. Its lawyers stated "…[we] will advise the Court that the time scheduled for the separate question is no longer required".

[136] On the same date, the insurer's lawyers wrote to the firm with a "without prejudice" settlement offer. For the purposes of "advancing an immediate settlement", they proposed that the insurer would:

(a) adopt all the recommendations of the engineer engaged by the trustees;

(b) not make any deductions for the disparity in the disclosed size of the home;

(c) not make any deductions for pre-existing damage or defects.

[137] In doing so, however, they made clear that the second and third issues, and the scope of the required repairs, would remain issues if the trustees' Court claim continued to hearing. They reiterated the insurer's position that the trustees had knowingly understated the size of the home on various renewals and had in fact on two occasions sought and received quotes for a much larger floor area that they did not take up.

[138] They recorded that although the insurer had "…put [the issue] down from an avoidance perspective, a size disparity of this order (in which only two fifths of the home's area has been disclosed) will have to be taken into account in the event that the parties require the Court's assistance with the earthquake claim".

[139] In short, the insurer had not abandoned its right to pursue arguments about the correct floor area at trial. My understanding from this correspondence is that the two sets of lawyers seemed to be in agreement about the legal significance of this stance. If the trustees had been unsuccessful at trial or at a separate hearing on the issue of material non-disclosure of the house size (as distinct from the validity of the insurer's avoidance of the policies), the Court would have been asked to scale back the allowable amount of their claim and their maximum claim would therefore have been substantially less than it was.

[140] The materials available to me do not include the insurer's lawyers' advice to the Court or any response filed by the firm, or any advice by the firm to the trustees as to:

(a) whether or not they had any choice in the matter of the hearing of the separate question of the validity of the policy avoidance being vacated; or

(b) if so, whether there was any potential benefit to the trustees in opposing the vacation of that hearing; or

(c) whether it was open to the trustees to seek instead for the specific issue of the alleged material non-disclosure of the correct house size being pursued as a separate issue.

[141] Rather, the firm focused on the settlement offer that had been made by the insurer.

[142] The only reference to the first issue I can find in the materials is in an email from Ms BF to the applicants and Ms VG in early December 2020 that "[t]he court date in June 2021 was only for the avoidance/separate issue to be heard. Given [the insurer has] withdrawn that aspect of their defence, the hearing of the avoidance issue will not be required on that date".

[143] The applicants now say it was negligent of the firm not to advise them to seek to have a separate hearing of the specific issue of the alleged material non-disclosure of the correct house size (as distinct from the policy avoidance issue), if it was procedurally open to them to do so.

[144] Ms WA says that the floor size issue would not have been suitable for determination as a separate legal question and that the trustees would have been definitively worse off if such the determination had gone against them.

[145] Ms WA's first point is a matter of professional judgement that I can make no comment on, particularly as I can have no idea what view either the insurer or the Court might have taken on it. I agree with her second point.

[146] Again, I can make no finding in relation to the allegation of professional negligence. I nevertheless observe that, in the circumstances, focusing on the settlement offer that had been made was the obvious thing for a reasonably competent lawyer to do. The terms of the settlement offer from the insurer plainly put the trustees in a much better position than they had been in up to that point in terms of litigation risk.

[147] The offer gave them the opportunity to achieve a settlement without incurring the costs of a hearing, on the basis of their own engineer's assessment of the required repairs, without the alleged material non-disclosure of the correct floor area, existing construction defects and previous declined claim being issues and consequently without any proportionate scaling back of the amount of their claim.

[148] Another material benefit of the offer was that the trustees would receive a cash sum that they could apply as they saw fit.[4] Under the relevant policy, they would have only received payments to apply against actual proved repair costs as such costs were incurred.

[149] Ms WA's assessment of the counter-factual seems to be a reasonable one. The trustees could have been in no better position in terms of achieving a settlement if a separate hearing of the floor size issue, if the Court had permitted it, had resulted in a ruling in their favour.

[150] Conversely, a Court ruling against them would have meant, at the least, the amount of their claim being scaled back by, it seems, 60 per cent or so.[5] I say "at the least" because it is perhaps debatable what significance a hypothetical insistence by the

[4] This is what Ms WA meant by an "out of policy" settlement.
[5] On the basis of Ms VG's floor area calculation, the deduction might have been up to 55 per cent.

trustees on proceeding with the separate hearing of the floor size issue would have had for the insurer's reversal of its policy avoidance decision.

[151] This whole issue appears to be driven by a fundamental misunderstanding on the part of the applicants about the settlement they ultimately reached at the JSC but I will discuss that aspect in dealing with the complaint about the conduct of the JSC.

[152] For the purposes of this review, the finding I make on the basis of the information available to me is that there is no evidence of a breach of r 3 of the Rules by Ms WA in relation to the firm's response to receipt of the insurer's August 2020 settlement offer.

[153] Notwithstanding that finding, it is open to the trustees to convince a Court that the firm was professionally negligent in its advice, or lack of advice, as to the possible benefit of a possible separate hearing of the floor size issue in the context of a Court claim of negligence against the firm.

(c) Did Ms WA breach any professional duty in respect of her advice to the applicants to proceed to a JSC and/or about the nature of the JSC process?

[154] The technical position in respect of this aspect of the review is that it is an additional ground of complaint raised for the first time on review and I therefore cannot deal with it. Because the matter was not raised in the complaint, no correspondence relating to it was in the complaint materials, the firm did not have an opportunity to respond to it and the Committee consequently made no comment about it.

[155] The applicants are entitled to make a fresh complaint about the matter if they wish to do so. In the interests of them making a decision about that in a semi-informed manner, I propose to make some observations about the matter.

[156] The relevant professional duty in this respect is also r 3 of the Rules. The question is whether Ms WA acted competently in giving whatever advice she gave to the trustees regarding the matter.

[157] There is no correspondence in the materials available to me about the request for a JSC, which was a joint one by both parties. I do not know what advice the firm gave to the trustees about the advantages and disadvantages of a JSC or about the JSC process either at that time or subsequently.

[158] The essence of the applicants' argument in this respect, which is again an allegation of professional negligence, appears to be that they should have been advised to engage in mediation instead and that, if that had occurred, there would have been

much more time available to work through all the disputed scope and costing information and Ms VG would not have been constrained in advocating on the trustees' behalf.

[159] The implication is that they would not have agreed to settle at the figure they settled at if a different process to arrive at that agreed figure had been pursued.

[160] This argument involves numerous assumptions. First, it assumes that the insurer would have agreed to go to mediation in circumstances where the dispute had been ongoing for five years, proceedings had already been under way for two years and the insurer's position was that it had no liability at all. Mediation is of course voluntary.

[161] Secondly, it assumes that a more lengthy or non-time bound negotiation, or one that did not involve the authoritative input of an Associate Judge, would have had a different outcome. This is possible. By the same token, there is no self-evident reason why it would be so. One of the benefits of a JSC over a mediation is that the presiding Judge can and does highlight for the parties the potential weaknesses of their factual or legal position. This is not always the case with a mediation, depending on the background and knowledge base of the mediator.

[162] It seems that the Associate Judge made clear to the trustees that he considered them to be at risk at trial on the material non-disclosure issues. It was up to the trustees whether or not they took that advice on board.

[163] The applicants are correct, however, that Ms VG's input would not have been constrained in a mediation.

[164] The applicants complain of the "duress" they felt themselves to be under because of the potential costs and risks of not agreeing to settle. The third assumption is that their perception of such costs and risk would have been any different in a mediation context rather than in a JSC. There does not seem to me to be any logical reason why this would be so, except perhaps that the authoritative input of a High Court Judge would not have been an element in their decision-making.

[165] In principle, the costs and risks would have been the same except that they would have had to pay their share of the costs of mediation, which would certainly have been higher than the prescribed JSC fee.

[166] For the purposes of this review, I make no finding on the matter for the reasons I have already stated. Again, it is open to the trustees to convince a Court that the firm was professionally negligent in its advice, or lack of advice, as to advantages and disadvantages of proceeding to a JSC and/or as to the nature of the JSC process.

[167] The applicants did seek advice about transferring their claim to the [redacted] Tribunal. The firm advised them that they could not pursue a legal costs claim in the tribunal, which is correct. The applicants chose to continue with the Court process.

(d) Did Ms WA or Ms BF breach any professional duty in not communicating a counteroffer to the insurer's lawyers?

[168] I repeat the text of r 13.3 for ease of reference:

> Subject to the lawyer's overriding duty to the court, a lawyer must obtain and follow a client's instructions on significant decisions in respect of the conduct of litigation. Those instructions should be taken after the client is informed by the lawyer of the nature of the decisions to be made and the consequences of them.

[169] The first element of the relevant context is that the insurer had made a detailed settlement offer by lawyers' letter dated 17 August 2020. The offer dealt with each individual aspect of the claim the insurer was prepared to accept for settlement purposes and calculated a figure for each one. The elements were the repair cost (for which a four-page schedule was provided), a deduction for the insurer's understanding of the trustees' EQC payment, scale 2B legal costs to that point (for which a schedule was provided), an estimate for disbursements, a sum for alternative accommodation and an "uplift, to assist settlement".

[170] Ms WA was on parental leave at the time. The firm, through Ms BF, immediately recommended that the trustees make a counteroffer and sought instructions about such an offer. She provided an initial draft letter to the applicants and Ms VG on 2 September 2020 for their review.

[171] In her covering email, Ms BF covered various points including, relevantly:

(a) a question as to what overall figure "potentially on top of an 'as is' sale price" they might consider suitable for the trustees to settle without incurring any further legal costs, time or stress;

(b) a question as to what they had to say in response to the insurer's repair cost estimate;

(c) a note of the correct EQC deduction, which was $37,000 less than the insurer's figure;

(d) the following note:

> Cost & disbursements – an increase on their $31K (actual legal costs are double this) but 2b is reasonable, need to add in expert report costs Separately need to add in claims preparation costs

(e) a note that the accommodation cost offer was the maximum payable under the policy;

(f) a note that the insurer's "uplift" offer was "more than a court would award and is outside the policy".

[172] Ms BF proceeded to give advice about some implications of not settling and proceeding to trial. These included the risk of payments being reduced by reason of the misstatement of the floor area and the pre-existing damage and defects issues and the fact that a payment after trial under the policy would mean:

> you would not receive a cash settlement to do with as you wish (as is currently on the table) but would need to incur the actual costs of repairing the damage and then be reimbursed for them up to a level proven in Court.

[173] She requested from the applicants in consultation with Ms VG "a summary table of all costs incurred (to work on splitting out expert costs between litigation/expert witness work and claims preparation time)" [and] "an idea of what figure you would like the counter offer to be for the start of negotiation purposes".

[174] The draft letter also included draft terms about the payment being a cash payment, rectification of the insurer's records about avoidance of the policies and confirmation of ongoing insurance cover.

[175] I will not traverse all the detail of the lengthy subsequent correspondence over the following six months in which the firm sought in vain to get definitive instructions about a counteroffer to be made. Of some importance, however, was Ms BF's advice in early September 2020 about legal costs. She stated in an email to the applicants and Ms VG:

> Costs are 2B as was set by the court. The scale costs reflect the complexity of the legal issues not the impact on the parties (we could provide details of our actual costs to try or try to argue that you should get an uplift on top of the 2b costs for being put to the costs of the avoidance argument unnecessarily. However, total actual legal cost incurred to date are $62K, so this might slightly increase the $31K on offer but it would not significantly increase the overall offer position as the claims prep and repair costs could).

[176] Importantly also, the firm had no information at that stage from the applicants or Ms VG as to their repair cost estimate. One of the questions Ms BF asked was whether they wanted to simply insert a figure they were comfortable with to start the negotiation or get the necessary expert reports to calculate an actual repair scope and costing.

[177] I infer that part of the background to that question was the possibility of getting a cash settlement and selling the property on as "as is" basis without undertaking repairs.

[178] A second draft of the letter was prepared a week later. This one had a provisional figure for repair costs of over four times the insurer's total offer, the correct EQC deduction figure, the insurer's figures for scale 2B legal costs, accommodation and "uplift" and a provisional sum for claims preparation costs that excluded Ms VG's costs, which had not at that point been advised.

[179] Further correspondence traversed numerous issues including the applicants' views on various additional potential heads of claim including a claim for "use of money" and one for eight to nine years of mortgage interest costs resulting from the delay in resolving the claim. Mr NH expressed the view that a "full scope" should be completed.

[180] Ms WA returned from parental leave and gave further advice as to possible items of repair cost that had not been taken into account in the engineer's report on which the insurer had based its repair cost figure. She nevertheless prepared a third draft of the counteroffer letter on the basis of her understanding that the applicants did not want to incur the cost of a full scope and costing of repairs. The third draft was dated 21 September 2022.

[181] It appears there was then a meeting at which various options were discussed but no decision was made. The insurer then threatened to withdraw its offer. Ms WA wrote to the applicants recording that "… we had discussed the possibility of saying a full scope needs to be done but asking for payment of 2B costs and professional fees to date".

[182] Mr NH's response included that:

> …we accept the bits and pieces they offered but we wanted to get a proper scope done by [Ms VG] before finalising the repair payments and a request that legal fees be more fully reimbursed up to the total we have paid based on the avoidance issue but we accept they will negotiate that back. And would they consider paying the scoping costs as they are done and agreed to as we progress as per policy.

[183] Mrs FH also relevantly responded: "Legal fees as per part 2B – full amount please of [the firm's] billing – given [the insurer has] withdrawn". In reply, Ms WA advised that the insurer would be unlikely to pay actual costs but this could be included in a counteroffer.

[184] Ms WA prepared a fourth draft letter to the insurer's lawyer dated 9 October 2020. She received no instructions. She sent the applicants a bill in early November.

[185] On 9 November 2020, the Court informed the parties that a case management conference (CMC) was scheduled for 30 November.

[186] Mrs FH sent further instructions on 12 November 2020. In summary, they were to accept the insurer's accommodation and "uplift" offers, claim about $110,000 in professional advisory (excluding legal) costs, check the correct EQC deduction figure with Ms VG, ask for payment of all actual legal costs but be prepared to negotiate on the issue, require the insurer to pay all further actual professional advisory costs until the policy settlement amount was agreed and defer agreement on repair costs until a full repair scoping and costing was completed.

[187] Mrs FH concluded by saying that her son and co-trustee was in [City] that week if Ms WA thought that meeting and discussing the instruction was warranted. Ms WA responded on 13 November 2020 that she was unclear about the proposed counteroffer and requested a meeting, preferably with the co-trustee also attending.

[188] On 23 November 2020, Ms VG sent a schedule of "earthquake damage and construction defects costs so far". This related to the professional advisory costs only, not the repair costs. On 23 and 24 November, Ms WA sent the applicants further requests for urgent instructions. Ms WA wanted to get a counteroffer sent to the insurer's lawyers before the CMC.

[189] On 25 November, Ms VG sent Ms WA "a counteroffer from [the applicants] as per their instruction and for your review", noting that Ms WA would advise the applicants on costs that might not be recoverable and that Mrs FH would confirm the applicants' instructions separately.

[190] Ms VG updated the schedule on 26 November 2020 and the firm again sought instructions from Mrs FH.

[191] The 26 November draft of the schedule is not in the materials before me but from the previous draft, I understand that the applicants wished the insurer to pay a figure just $17,000 less than the insurer's total offer just for cost reimbursements (including both actual legal costs and scale 2B costs) and some of the "bits and pieces" claims, including the "uplift" sum, with the house repair still left for scoping and costing.

[192] The applicants also wished for house repair scoping and costing to be determined solely by the experts they engaged, with the process directed by Ms VG and the insurer to be precluded from involvement other than to pay the applicants' experts' costs. Mrs FH was very forthright and expressive in her email to Ms WA of 26 November 2020 setting out her rationale for the insurer meeting all actual costs the applicants had incurred.

[193] Also on 26 November, however, Ms VG emailed Ms WA, copying the applicants, stating "I have talked to [Mrs FH] who now understands the process a bit more clearly. [Mrs FH] is happy with the memorandum [for the CMC] and acknowledge[s] the counteroffer is [a] separate issue and will be dealt with next week".

[194] On 30 November, timetabling orders were made at the CMC. Also on 30 November and again on 3 December 2020, Ms WA recorded by letter to the applicants that she was still awaiting finalised instructions to present a counteroffer to the insurer. She did so again on 14 January 2021 in reply to a query from Ms VG.

[195] On 5 February 2021, Ms WA again recorded in a letter to Mrs FH that the firm had not made a settlement offer because it had not received her instructions to do so.

[196] On 10 February 2021, Mrs FH gave instructions in an email to Ms WA copied to Mr NH and Ms VG. She specified the counteroffer terms and letter format and required it to be sent by 17 February 2021. She recorded that Ms VG had reviewed the offer and recommended that it be sent. She permitted Ms WA to prepare a covering letter and requested that it include that all legal costs incurred in respect of the policy avoidance claim be fully recompensed.

[197] Mrs FH also requested that "use of money costs are applied" and instructed Ms WA to "determine that value and add into overall costs". I infer that this was Mrs FH's way of saying she wanted to claim interest on the relevant costs from the date they were incurred until either the insurer's reversal of its avoidance of the policies or the date of payment.

[198] The specified offer was for two sums offered by the insurer at the outset plus actual claims preparation and legal costs, a "use of money" claim on the claims preparation costs and legal costs (to be calculated), all further legal costs (since August 2020) on a scale 2B basis, all actual house repair costs as per scoping, assessments and reporting to be done by the parties' respective experts under Ms VG's oversight with all experts' costs to be paid by the insurer and the settlement amount to be paid in cash.

[199] I note that one of the two sums that had been offered by the insurer was an "uplift" amount in the interests of prompt settlement and that Mrs FH's proposed response was not in substance a settlement offer. It is objectively unclear why Mrs FH could have thought the applicants might receive an "uplift" amount for not settling.

[200] Ms BF replied on behalf of the firm on 17 February 2021. In summary, she:

(a) advised that "there is some risk in making this counteroffer at the moment when we have a new timetable in place…";

(b) stated that it would be helpful to understand the trustees' new engineer's position and see his report before the applicant committed themselves to a counteroffer;

(c) advised that it was unlikely the insurer would consider paying a sum very close to its existing total settlement offer with the full house repair cost still to be paid;

(d) recommended not making the counteroffer at that time but awaiting the engineer's report and then discussing either the applicants' proposed counteroffer, or a full and final settlement offer, or a request for a contribution to legal and claim preparation costs to continue their claim.

[201] Mr NH replied the following day, copying Mrs FH and Ms VG. He wrote:

> I personally agree with the timing aspect so will agree that we hold the counter offer in abeyance at the moment until it is agreed that the timing is more appropriate.

[202] There was no reply from Mrs FH or Ms VG.

[203] The next correspondence on the Committee's file is an email from Mrs FH four months later, on 28 June 2021, about the availability of the independent trustee to attend at the firm's offices "… in regards to signing off on the future settlement offer". There is no evidence before me that any instruction to give such an offer was given after that date.

[204] The above course of events needs to be interpreted in terms of r 13.3 quoted above. My interpretation is as follows:

(a) the possible making of a counteroffer to the insurer's settlement offer was a potentially significant step in the conduct of litigation in that it had the potential to bring the litigation to an end;

(b) the firm went to considerable effort over a six-month period to obtain fully informed instructions;

(c) the applicants were reluctant to heed the firm's advice, particularly as to a position on costs that had any reasonable prospect of being considered by the insurer;

(d) Mrs FH's outline instruction of 12 November 2020 did not reach the point of a finalised offer that could be put to the insurer;

(e) Mrs FH's instructions of 26 November 2020 based on the schedule prepared by Ms VG were deferred by Ms VG on her behalf for discussion the following week;

(f) there was no discussion of the proposed counteroffer the following week or at any time until mid-February 2021;

(g) Mrs FH gave an explicit instruction on 10 February 2021 about the form and most of the content of a counteroffer;

(h) this was not an offer of settlement but more of an interim demand for past costs to be paid in full and the applicants to have control over the process of ultimately arriving at a settlement figure;

(i) it also required the firm to determine a basis for and calculate the "use of money" claim;

(j) in fulfilment of the firm's duty under r 13.3 and in the context of factual situation at the time, Ms BF sought to explain the nature of the decisions to be made and their implications;

(k) Mr NH heeded that advice and on 18 February 2021 countermanded Mrs FH's instruction of 10 February 2021, his email being copied to Mrs FH and Ms VG;

(l) There was no further instruction to make a counteroffer.

[205] In those circumstances, I do not consider that either Ms WA or Ms BF breached r 13.3 of the Rules. There was an instruction from one trustee on 26 November 2020 that was countermanded by the trustees' claims manager the same day and another instruction from one trustee on 10 February 2021 that was countermanded by another trustee on 18 February 2021.

[206] A definitive instruction to make a finalised counteroffer was ultimately never given by the applicants.

[207] In terms of r 3 of the Rules, I do consider that Ms BF could have been considerably more direct and forthright in February 2021 in advising the applicants that an offer of the kind that Mrs FH had sought to develop since November 2020, particularly

in its fixation on the recovery of all actual costs to August 2020 and with the repair costing left completely up in the air, was likely to derail rather than progress the possibility of settlement.

[208] The supposed relevance of the forthcoming engineer's report seems to me to have been tangential given the nature of the counteroffer Mrs FH wished to put forward.

[209] Both Ms BF and Ms WA had nevertheless made clear consistently since September 2020 that a demand for a legal costs reimbursement materially higher than scale 2B costs was unlikely to be well received given that a Court would be unlikely to award it. Ultimately, however, that was the applicants' decision to make.

[210] I find that a complaint relating to the proposed counteroffer, to the extent it can properly be interpreted as either a breach of r 3 or a potential breach of r 13.3 for failing to follow instructions, is not made out.

[211] Again, however, it remains open to the applicants to persuade a Court that the course of the advisory process between August 2020 and February 2021 in relation to the development of a possible response to the insurer's settlement offer and ultimately the absence of any response to it amounts to professional negligence and then to persuade the Court that the trustees suffered loss as a result.

[212] I make the observation that the second of those two elements would seem to be particularly difficult for the applicants to establish, even if they were to succeed in establishing either that negligent advice was given or advice was negligently not given.

(e) Did the floor area issue affect the outcome of the JSC?

[213] There is no primary record of the conduct of the JSC.

[214] I observe that the prior correspondence over a two-year period from the insurer's reversal of its policy avoidance decision in August 2020 is consistent with the firm's understanding of the matter, namely that the floor area issue (and other non-disclosure arguments) had been put aside by the insurer and had no bearing on its settlement offer at the JSC. On that basis, the supposed issue could have had no bearing on the figure the trustees agreed to accept.

[215] If it were just a matter of the applicants' stated understanding, I would be confident in forming the view that they are simply mistaken and that their stated understanding is prompted solely by the coincidence that the amount they agreed to receive in settlement represents approximately 40 per cent of the maximum total sum

they believed they could claim under the policy, based on Ms VG's advice and calculations.

[216] In her evidence, however, Ms VG supports the applicants' understanding. She says, in relation to the floor area issue, that the insurer's representative said "we won't go down that path" but that she was unsure what the representative meant by that at the time.

[217] She asserts that she was prevented from speaking at the JSC about the floor area issue and that a "pro-rata of the floor area" was applied "which reduced the size and settlement amount for [the trustees] by approximately $380,000… plus the legal costs. That was a poor outcome."

[218] Ms WA says that the floor area issue was addressed in her opening statement and that the insurer agreed to "put down" the issue and also to put to one side, to the extent that it could, the dispute about the distinction between construction defects and earthquake damage. She says that Ms VG was not prevented from participating in discussion of the floor area issue because there was no discussion of the issue, the insurer having conceded it solely for the purposes of the JSC.

[219] She says that negotiations at the JSC were focused on various aspects of the claimed scope of repairs that were in dispute, including as to whether or not they were occasioned by the earthquakes, but were all premised on 100 per cent of the actual floor area. She says that Ms VG simply misunderstood the discussion.

[220] I do wonder whether Ms VG's evidence might have been influenced by her own view of the nature and calculation of the expenses properly claimable under the relevant policy but I have no information about the terms of the policy or the validity or accuracy of Ms VG's views on those matters.

[221] Conversely, the settlement sum agreed at the JSC is slightly ($5,000) less than the sum of the insurer's own calculation by then of the house repair costs plus the accommodation and "uplift" amounts and scale 2B legal costs on the Court proceedings to that point.

[222] Alternatively calculated on the assumption that the insurer had by then withdrawn the "uplift" offer, the settlement sum agreed at the JSC is less than the sum of the insurer's own calculation by then of the house repair costs plus the accommodation amount, the experts' fees, the claim preparation costs and scale 2B legal costs on the Court proceedings to that point.

[223] Be that as it may, for the purposes of this review there is a direct and fundamental conflict of evidence that I cannot reconcile in a hearing on the papers and would not be able to reconcile in an in-person hearing either as it would require corroborative evidence from other participants at the JSC. Accordingly, I can make no finding on the question of whether the floor area issue affected the JSC outcome.

[224] I nevertheless observe that the settlement figure was a figure the trustees agreed to accept on the day. They were not obliged to accept it. I accept their evidence that they were influenced in doing so by their perception of the costs and risks of not agreeing to settle but there is no complaint they can make against Ms WA or the firm on that score. What the applicants describe as "duress" was not, on the basis of their own explanation of it, the result of any action taken by the firm in representing them at the JSC.

[225] As with the other aspects of alleged professional negligence, it remains open to the trustees to persuade a Court that the floor area issue remained an influential factor at the JSC and that they were precluded from pursuing recovery of the full amount they believed, for whatever reason, they could expect to recover at hearing.

(f) In relation to the floor area issue, is there evidence of any breach of professional duty on the part of Ms WA?

[226] As I have already noted, there is no primary record of the conduct of the JSC.

[227] The insurer produced a builder's scope of works and costing for repairs of a specified maximum figure (the higher of two calculations), including an allowance for professional fees. According to the insurer's counsel's memorandum filed before the JSC, this costing was expressly on the basis that, for the purposes of the JSC, it would not be relying on "the largely consensual expert advice … that the great majority of the claimed earthquake damage pre-existed the earthquakes" and therefore that all the repairs as scoped and costed by its builder were covered by the policy.

[228] The trustees produced a builder's scope of works and costing for repairs of a specified figure over $300,000 higher than the insurer's figure, including a substantially higher allowance for professional fees.

[229] Ms VG's signed will-say statement referred to a total repair cost slightly higher than the builder's costing.

[230] The applicants will-say statement referred to repair costs as calculated by Ms VG plus accommodation costs, storage costs, professional fees, claims preparation costs, legal fees (not quantified) and interest (not quantified).

[231] I have no information as to what costs were properly claimable under the policy or as to any limits that might have been applicable. Any relevant dispute about that would be a legal issue of interpretation that could only be determined by a Court.

[232] Against that difficult background, the JSC participants' (the applicants, Ms WA, Ms BF and Ms VG) respective recollections of the firm's advocacy of the trustees' interests at what was a full-day JSC are vastly and irreconcilably different.

[233] The applicants have the burden of establishing on the balance of probabilities that Ms WA and/or Ms BF were in breach of their professional duty of competence and diligence in their advocacy of the trustees' interests.

[234] In all the circumstances, there is no factual finding I can make as to any lapse by Ms WA and Ms BF in the required standard of competence and diligence, for the purposes of r 3 of the Rules. This aspect of the complaint is therefore not made out.

(g) In relation to the legal costs issue, is there evidence of any breach of professional duty on the part of Ms BF?

[235] I make two initial observations about this issue. The first is that Ms WA's explanation of the nature of scale 2B costs is the same as the explanation Ms BF gave the respondents when Mrs FH first raised her wish to claim actual legal costs, in August 2020, namely that the scale relates to the complexity of the proceedings and not to amount of actual legal costs incurred. That explanation is correct.

[236] The second is that there is evidence of the firm explaining on at least two occasions in writing that the insurer was unlikely to agree to pay voluntarily any sum for legal costs greater than the sum it would be ordered to pay by the Court, namely 2B costs. That is a matter of professional judgement and professional experience of the exercise of judicial discretion in similar cases. There is no evidence before me to indicate that Ms WA's and Ms BF's professional judgement on that issue was unduly conservative.

[237] There are then three aspects of Mrs FH's stated beliefs about legal costs recovery that have no objective basis. The first is her apparent belief that legal costs relating to advice and negotiations before the issue of proceedings can be claimed in

Court proceedings. Scale 2B costs (or any other scale costs) relate solely to specific identified steps taken in the Court proceedings.

[238] The second aspect is Mrs FH's stated belief that a party can expect to recover 75–80 per cent of costs incurred in a scale 2B costs award. There is simply no objective basis for that belief. The basis of calculation of 2B costs had been an express part of the correspondence since the insurer's first settlement offer of 17 August 2020. Even at that early stage, the costs claimable were less than a third of the figure Ms BF provided for actual costs to that point.

[239] Cost awards on a 2B basis are the norm in most High Court proceedings. Such costs awards are not intended to represent full costs recovery for the successful party, however. On the contrary, when the rates were set, the principle stated by the drafters of the legislation[6] was that "an appropriate daily recovery rate should normally be two-thirds of the daily recovery rate considered reasonable in relation to the proceeding".

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

[241] I would hesitate to express any "rule of thumb" given the very broad spectrum of potentially relevant influencing factors and the fact that the Court always has a discretion to order an "uplift" on the scale figure depending on the circumstances but the comparison (or contrast) Ms BF drew to the applicants' attention in September 2020 does not surprise me.

[242] The third aspect is her comment that the insurer had "capitulated on" or "abandoned" the floor area issue. What the insurer had done was to reverse its avoidance of the policies. It had not abandoned its right to argue at trial for scaling back the trustees' claim by reason of material non-disclosure of the size of the house. This is indeed the basis of one of the applicants' allegations of negligence against Ms WA.

[243] I turn now to the specific allegation made by the applicants against Ms BF, which was that she provided to the Judge, in response to a question from him, a figure of $80,000 for all legal costs incurred to that point. Ms BF denies that any figure was provided to the Judge. She says, through Ms WA, that the discussion about legal costs was during the lunch break and that the context was arriving at a settlement figure the trustees might agree to that would clear their then current liabilities.

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

[244] The issue for me on review, once again, is whether there is evidence on which a finding can be made, on the balance of probabilities, that Ms BF's alleged answer to the alleged question constituted a failure to meet the standard of competence and/or diligence a member of the public is entitled to expect of a lawyer.

[245] I would be surprised if the Judge would have had reason to ask what actual legal costs the trustees had incurred. The trustees' amended statement of claim in the proceedings did not include a claim for indemnity (actual) legal costs on the proceedings.

[246] By the same token, if a question was asked by the Judge and the answer was $80,000, the context cannot have been a discussion of scale 2B legal costs, which would have been a much lower figure than that. There are four references to either "$25k" or "$26K" for 2B costs in the respondents' contemporaneous JSC notes.

[247] There are two references in the respondents' contemporaneous JSC notes to a figure of "80K". One is to an allowance for a cumulative sum for accommodation costs, the engineer's costs, Ms VG's costs and 2B legal costs. The other reference is illegible but it appears immediately above a figure of "60K" for "CL" (presumably referring to the firm) and therefore could not have been intended to be a figure for legal costs.

[248] Be that as it may, there is no finding of fact I can make in the face of the stark conflict in the evidence of the parties to the review. Accordingly, this aspect of the complaint is not made out.

[249] Again, it is open to the trustees to persuade a Court that their recollection of the course of events is correct, that the Judge asked that question, that Ms BF's answer to it was negligent and that they have suffered financial loss as a result. Those are factual and legal issues for a Court to determine.

[250] The observation I make is that a figure of $80,000 is about three times the amount of scale 2B costs to that point, so any alleged claim of loss would seem to be premised solely on Mrs FH's apparent beliefs about the amount of additional legal costs the Court would have awarded in proceedings of that nature despite scale 2B being applicable.

(h) In relation to the issue of Ms VG's will-say statement, is there evidence of any breach of professional duty on the part of Ms BF?

[251] The complaint originally made by the applicants was specifically that Ms BF had failed to describe Ms VG as their claims manager in her will-say statement and that this was why she had been unable to advocate for the trustees' interests.

[252] Expressed in that way, this aspect of the complaint must fail for the simple reason that Ms VG was described in the will-say statement as quantity surveyor and claims manager. Further, she had been expressly asked how she wished to be described and had stipulated "quantity surveyor and claims manager".

[253] The implicit, wider issues are whether Ms BF was at fault for not ensuring that Ms VG was able to advocate for the trustees' wider interests at the JSC and/or whether the applicants were not well enough informed about the conduct of a JSC.

[254] In my view, five things about this element of the complaint are not debatable. The first is that the will-say statement was prepared on the basis that Ms VG was attending the JSC to give independent, expert evidence on the cost of repair and the amount of other claims properly made under the policy. The text of her statement is short and is restricted to those matters.

[255] The second is that she approved and signed her will-say statement in that capacity and in doing so confirmed she had read and understood the Code of Conduct for Expert Witnesses in Schedule 4 of the High Court Rules 2016 (Code of Conduct).

[256] The third is that an independent, expert witness in a Court proceeding cannot also act as an advocate. This was the very point of the question asked by the insurer's lawyers before the JSC regarding the capacity in which Ms VG was attending. Clause 2 of the Code of Conduct expresses this basic principle as follows: "An expert witness is not an advocate for a party who engages the witness".

[257] The fourth aspect is that, in passing on that query, Ms BF cautioned Ms VG about not describing herself in a way that would prejudice her ability to give the expert evidence she was attending to give. She did so in a way that assumed Ms VG was experienced in giving expert evidence in Court proceedings.

[258] The fifth is that Ms VG's professional experience as detailed in her curriculum vitae is varied and extensive, including the settlement of over 500 insurance claims since the [region] earthquakes with a value of over $300 million acting both for and against insurers.

[259] There are then some things about this element of the complaint that are less clear. The first is how Ms VG, given her extensive experience, could have believed she would be able to advocate for the trustees' interests at the JSC when she was attending to give expert evidence and had approved and signed a will-say statement as an expert witness.

[260] The answer possibly lies in the combination of a comment made by Mrs FH in the materials that seems to indicate that Ms VG had no previous experience with JSCs and comments made by Ms VG about her experience in attending “mediations” and that the participants were “not in a formal courtroom”.

[261] A JSC is not a mediation. It is a negotiation process facilitated by a Judge and governed by the High Court Rules 2016 (and one that normally does occur in a courtroom). The participation of expert witnesses is governed by the Code of Conduct, which, as noted above, Ms VG expressly confirmed she had read and understood.

[262] The common feature of a mediation and a JSC is that the process is confidential and “without prejudice”, meaning that statements and offers made cannot be referred to subsequently in a Court hearing if the dispute is not resolved.

[263] There is nothing in the materials to indicate that Ms BF was aware of either Ms VG’s possible unfamiliarity with the role of an expert witness in Court processes or of her retrospectively apparent intention to advocate for the trustees’ interests at the JSC. I consider it was reasonable for Ms BF to have assumed that Ms VG understood the role of an expert witness and was attending to give the evidence summarised in her will-say statement.

[264] The next thing that is less than clear is the nature of the understanding each of the applicants had of the JSC process at the time they attended it. For the purposes of the complaint, Mrs FH’s position is that she was reliant on Ms VG effectively leading the argument for the trustees and that it was the respondents’ role to provide Ms VG with the necessary facts.

[265] Mrs FH’s stated understanding is inconsistent with the respondents’ memorandum to the Court in advance of the JSC and Ms WA’s opening statement. As a matter of common sense and for the reasons already stated, I find it difficult to believe that Ms VG could have had that understanding at the time.

[266] Mr NH seems to have had the opposite understanding. His complaint is in substance that the respondents were the advocates and did not advocate forcefully enough for the trustees. I can make no finding of credibility in a hearing on the papers but consider it inherently extremely unlikely that either respondent could have said that they were “only there to take notes”.

[267] There is nothing in the materials available to me to indicate what explanation or advice, if any, the respondents gave the applicants about the nature of the JSC process beforehand. It is possible that they were insufficiently informed and that the respondents bear some responsibility for their lack of understanding.

[268] Given the degree of their reliance on Ms VG, it is also possible that the applicants' apparent lack of understanding of the JSC process was influenced by Ms VG's apparent lack of understanding of that process.

[269] I note there is no suggestion that Ms VG was excluded from the discussions the applicants had with their advisers on the day of the JSC as to an amount they would be willing to accept on settlement.

[270] The specific complaint is that Ms BF negligently prepared the will-say statement in describing Ms VG. There is no factual basis for that specific allegation. Understandably, even Ms VG does not suggest that the form of her will-say statement affected her ability to participate. It was the Judge who told her to "stay in your lane".

[271] The issue for me on review is whether there is evidence on which a finding can be made, on the balance of probabilities, that the respondents' advice to the applicants about the nature and conduct of the JSC process was deficient such as to give rise to a breach of their duty of competence and diligence. On the information available to me, that is not a finding I can make.

[272] As with all the applicants' other allegations of negligence, it remains open to them to persuade a Court that the firm's advice to them was deficient in this respect and that this was a cause of financial loss they have suffered. Those are again matters of fact and law for a Court to determine.

[273] The observation I make is that the applicants would need to persuade the Court that it was the restriction on the extent of Ms VG's involvement in the JSC that led them to agree to a settlement figure that they subsequently considered to be too low.

[274] I appreciate that Ms VG's own opinion is that she had a central role to play in achieving an outcome that the applicants would have considered satisfactory. It appears that she also played a central role in setting their expectations as to what such a figure might be.

[275] The further observations I make in that regard are that Ms VG was not a "witness of fact", as both applicants described her in their submissions on review, and that she

could have played no greater role at a hearing than she played at the JSC, unless the trustees engaged a different quantity surveyor as their expert witness on cost to repair.

(i) Is there evidence that the firm breached any professional duty in failing to advise the applicants that they were entitled under their policy to recover all professional fees incurred in pursuing their insurance claim?

[276] This allegation was made for the first time on review. I have no jurisdiction to consider the matter and decline to do so.

[277] I note, however, that the trustees' amended statement of claim prepared by the firm expressly pleaded that it was a term of the policy that:

> [the insurer] will pay…the following costs as long as they were reasonably and necessarily incurred:
>
> (a) architects', engineers', surveyors', building consultants', legal and council fees…

[278] The amount for which judgment was sought then included "…the professional fees that the plaintiffs have incurred and will continue to incur, the amount of which will be determined at trial".

[279] I note that all settlement offers that were made included allowances for professional advisory fees and that there were differences between the parties as to the need for and amount of such likely fees. This makes sense as the repairs had yet to be undertaken.

[280] I note also that Ms WA made a comment in response to the review application that once proceedings were issued, the amount of professional advisory fees that could be claimed became subject to the discretion of the Court.

[281] I wonder whether the belated addition of this complaint particular on review has been prompted by the trustees' liability for the very substantial claims preparation fees billed by Ms VG. Assuming the relevant term of the policy is correctly quoted above, the reasonableness of those fees and the need for them would always have been open to dispute by the defendants.

[282] Be that as it may, it is open to the applicants to make a fresh complaint to the NZLS about the advice they received on the matter and/or for the trustees to include it in any claim of professional negligence they decide to pursue by way of Court proceedings.

(j) Did the firm's correspondence to the applicants requiring payment of outstanding fees constitute breach of any professional duty owed by the firm to the applicants?

[283] Rule 10.1 of the Rules provides that a lawyer must, when acting in a professional capacity, treat all persons with respect and courtesy.

[284] As previously stated, I consider this aspect of the complaint properly lies against the incorporated firm, not against Mr RW personally. It was the firm that was owed fees and the firm seeking to have them paid.

[285] There was email correspondence between Mrs FH and the firm's credit control and management personnel in August and September 2022. The context from the applicants' perspective was that the settlement sum received from the insurer was less than the amount owing on the trustees' bank mortgage and the bank was in control of its disbursement. Their position was that there were no funds readily available to them to pay the firm's fees.

[286] The context from the firm's perspective was that the Court proceedings had concluded by way of an agreed settlement and their fees needed to be paid. The amount outstanding represented over half of the total sum invoiced by the firm over the five years since they had first been instructed.

[287] Mrs FH refers to a "heavily intimidating" email received from Mr RW. There is no email from Mr RW in the available correspondence meeting that description. Mr RW on behalf of the firm offered to engage directly with the bank to have funds released to pay the outstanding fees. The applicants declined to consent to this course of action.

[288] Mr RW then wrote formally to all four trustees, on 12 September 2022. His letter:

(a) set out the amount then owing,

(b) referred to the fact the instalment payment arrangement applied until the claim was settled,

(c) recorded that the claim was settled,

(d) recorded that the payment arrangement had not been adhered to,

(e) requested payment in full by a specified date,

(f) stated that recovery action would be taken if payment was not made,

(g) referred to the fact that costs would also be payable in that circumstance,

(h) asked the trustees to contact him to discuss the matter and,

(i) stated that the firm was happy to contact the bank regarding the release of settlement finds to clear the debt.

[289] I consider that there was nothing disrespectful or discourteous in the wording of the letter or in the fact that it was sent. It was business-like and professional.

(k) Has there been a fees complaint?

[290] This issue is not clear-cut. The NZLS appears to have assumed on receipt of the complaint that it was a complaint about the amount of the firm's fees. Consequently, it drew the firm's attention to s 161 of the Act, which prohibits a lawyer or firm from taking or continuing with any proceedings for recovery of unpaid fees until a complaint about the amount of fees has been resolved.

[291] Mrs FH on behalf of the applicants was very precise and detailed in her initial, 17-page explanation of the complaint. This did not include any assertion that the firm's fees were unfair to the trustees or unreasonable.

[292] The applicants have, as I have noted above, added some additional grounds of complaint on review. The nine pages of submissions on review do not include any assertion that the fees themselves were unfair or unreasonable.

[293] In summary, at no point in the detailed and extensive complaint materials or in the application for review do the applicants say that they consider the fees charged by the firm to have been unfair to them or unreasonable for the work done.

[294] Rather, they say that the firm was negligent in the various ways specified above, that they have suffered loss as a result of that negligence in terms of the settlement sum they agreed at the JSC and that they should be compensated for that loss. The outcome sought of a refund and reduction of fees is expressed as a mechanism for payment of compensation on the assumption that grounds for the compensation claims are made out.

[295] In responding to the original complaint, Ms WA pointed out that at no time during the five-year course of the instruction did the applicants query or dispute any invoice or ask for additional information about any fees charged. Nor did they do so on receipt of Mr RW's letter in September 2022.

[296] I observe that there was nevertheless extensive correspondence between the firm and the applicants at various points in the retainer over the non-payment of fees, about payment arrangements, about bank financial support for payment of fees, about the firm's possible withdrawal from acting for non-payment and about a fee estimate for going to trial. Again, no issue was ever raised about the fees themselves.

[297] The Committee clearly did not consider that a fees complaint had been made. It made no mention of the matter. I consider that it was correct in that approach. In all the circumstances, I am satisfied that no fees complaint has been made.

(l) If so, has the firm breached s 161 of the Act?

[298] It follows that the firm cannot have breached s 161 of the Act in issuing recovery proceedings against the trustees.

[299] In any event, the complaint was initially filed with the NZLS on 4 October 2022, the proceedings were filed on 8 November 2022 and partially served on or about 23 November 2022 and the NZLS notified the firm of the complaint at the earliest on 27 November 2022 and formally on 12 December 2022.

[300] I have no information as to why there was a delay of nearly eight weeks in the NZLS notification of the complaint to the firm. Regardless of that, the firm did not know that a complaint had been made when it filed and subsequently partially served its proceedings.

[301] The firm then refrained from taking any further step in the proceedings. They have yet to be served on all trustees.

[302] Accordingly, there can have been no breach of s 161 of the Act even if the complaint had been a fees complaint.

(m) Also if so, has the fees complaint been properly addressed by the Committee and what action, if any, should I take?

[303] For the above reasons, this question does not need to be addressed.

Decision

[304] For all the reasons set out above and although I differ from the Committee on the findings of fact that can properly be made where the evidence about the conduct of the JSC is so markedly conflicting, there is nothing that persuades me to depart from the Committee's essential conclusions expressed succinctly in paragraph [22] of its decision.

[305] The Committee made its decision under s 138(2) of the Act on the grounds that further action was neither necessary nor appropriate.

[306] In my view, given that most of the complaint particulars are in substance allegations of professional negligence and because Court proceedings by the firm against the trustees are in train, s 138(1)(f) of the Act is also applicable. That provision empowers me to decide to take no further action if "… there is in all the circumstances an adequate remedy … that it would be reasonable for the person aggrieved to exercise".

[307] I acknowledge that the applicants can pursue a claim of professional negligence by Court action only with the consent of their fellow trustees. That is matter for them to address. As not all trustees have yet been served and the trustees therefore have presumably not yet filed a statement of defence, it remains open to them to address it.

[308] Accordingly, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Committee to take no further action on the complaint is modified such that it is made under both s 138(1)(f) and s 138(2) of the Act.

Publication

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

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

[311] Having had regard to the issues raised by this review, I have concluded that it is desirable in the public interest that this decision be published in a form that does not

identify the parties or others involved in the matter and otherwise in accordance with the LCRO Publication Guidelines.

DATED this 28TH day of FEBRUARY 2024

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FR Goldsmith
Legal Complaints Review Officer

Copies of this minute are to be provided to:

Mr NH and Mrs FH as the Applicants
Ms WA, Ms BF and DT Limited as the Respondents
Mr ER, Mr TB and Mr AQ as related persons
[Area] Standards Committee [X]
New Zealand Law Society