LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 093

Ref: LCRO 188/2021

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**P & R MC** Applicant
AND	**JK and UV** Respondent

DECISION

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

Introduction

[1] Mr and Mrs MC have applied to review the decision of the [Area] Standards Committee [X] (Committee) to take no further action on their complaints about the conduct of Mr MC's former lawyer, Mr JK.[1] They also apply to review the decision to take no further action on their complaint about Mr JK's firm's employed solicitor, Ms UV.

[2] In relation to both lawyers, the Committee based its decision on ss 138(1)(f) and (2) of the Lawyers and Conveyancers Act 2006 (the Act).

[3] The former section allows a Committee to dispose of a complaint at an early stage if it considers that the complainant has an alternative remedy that it would be reasonable for them to pursue.

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[1] For convenience, throughout this decision, I will simply refer to Mr MC, as the underlying litigation involved him and his former partner, Ms M.

[4] Section 138(2) of the Act allows a Committee to take no further action on a complaint if, during the course of its investigation, the Committee concludes that further action is neither necessary nor appropriate.

Background

[5] Mr MC was involved in relationship property proceedings (the proceedings) with his former partner (Ms M). He became dissatisfied with the law firm representing him. A friend recommended that he instruct Mr JK.

[6] Mr MC and Mr JK met and spoke about the proceedings, in about September 2017. Mr JK agreed to act for Mr MC.

[7] Ms M was represented by a solicitor who was taking a firm and uncompromising position on behalf of her client.

[8] Amongst the issues in the proceedings were disagreements about relationship duration, ownership, contribution and valuations. The potential property pool was not insignificant.

[9] Following a Judicial Settlement Conference, the parties agreed that the sum of approximately $150,000, being an insurance pay-out following earthquake damage to a home, would be held by Mr JK in his firm's trust account as a stakeholder (the stakeholder funds) for both parties, pending final decision about relationship property by the Family Court.

[10] Mr MC had deposited approximately $340,000 into Mr JK's firm's trust account, being funds from a bank account that he had closed and sale proceeds from a large vehicle.

[11] On 31 July 2018 Mr JK transferred those funds to Ms M's lawyer's trust account, on the basis of his calculation that they represented a portion of what Ms M would be entitled to (the interim distribution).

[12] As well, Mr JK anticipated that receipt of those funds might encourage Ms M to adopt a more conciliatory approach and perhaps settle the proceedings.

[13] Settlement did not occur, and the proceedings were heard on 10 and 11 September 2018 in the Family Court. A decision was issued on 21 January 2019.

[14] Mr MC was unhappy with the outcome and obtained legal advice elsewhere.

[15] An appeal against the Family Court's decision was pursued and in a judgment delivered in February 2020, the High Court made some adjustments to the lower court decision.

[16] In approximately May 2020, Ms UV a junior solicitor in Mr JK's law firm, took steps on her employer's behalf to recover outstanding fees said to be owed by Mr MC.

[17] Mr MC challenged the invoice in question saying that he had never received it.

[18] In December 2020, Ms UV lodged a claim to recover the fees, in the Disputes Tribunal.

Complaint

[19] Mr MC lodged his complaint about Mr JK's representation, with the New Zealand Law Society Complaints Service (Complaints Service) on 11 January 2021.

[20] As matters have progressed through both the complaints and review processes, Mr MC's complaints may now be summarised as follows:

(a) He did not receive any terms of engagement from Mr JK.

(b) He never received an invoice from Mr JK. In any event, the fees were excessive.

(c) On 23 November 2017, rental money in the sum of $5,182.09, from Māori land owned by Mr MC was mistakenly paid by the tenant to Ms M (the Māori land payment). Mr JK did not follow Mr MC's instructions to pursue the return of that money from Ms M. As a result, it was not recognised as Mr MC's separate property in the relationship property calculations.

(d) He did not authorise Mr JK to send funds to Ms M's lawyer on 31 July 2018.

(e) Mr JK did not prepare him for cross-examination during the hearing.

(f) Mr JK failed to properly cross-examine Ms M during the hearing.

(g) Mr JK failed to explain to the Family Court Judge how the sum of $345,000, transferred to Ms M's lawyer, had been made up. This resulted in the Judge not understanding that it had come from separate property, and she wrongly applied it towards relationship property.

(h) In submissions exchanged after the hearing in September 2018, Mr JK failed to identify and correct errors made in Ms M's lawyer's calculations.

Response

[21] Responding to the issues of complaint, Mr JK said:[2]

(a) He believes that terms of engagement were provided, and most probably handed to Mr MC at an initial meeting with him.

(b) Mr JK advised Ms M's lawyer that the Māori land payment had been made to Ms M in error. He asked for it to be reimbursed by Ms M but instead agreement was reached whereby Mr JK could reimburse Mr MC from the stakeholder funds. Mr JK did so. The net effect to Mr MC was neutral.

(c) Ms M was appropriately cross-examined.

(d) He was authorised by Mr MC to make the interim distribution on 31 July 2018. "It was clear that the total settlement due to [Ms M] would be greater than the amount [that Mr JK's law firm was] holding." Mr JK acknowledged that Mr MC nevertheless "reluctantly accepted" this, and accordingly instructed him to make the interim distribution.

(e) He believes that he handed Mr MC the invoice in question (dated 31 July 2018), at a meeting with Mr MC on 22 August 2018.

(f) Prior to Mr JK's firm taking steps to recover the unpaid fees, Mr MC had not raised any issues of complaint or concern about Mr JK's conduct.

[22] In later correspondence to the Complaints Service, Mr JK provided copies of:[3]

(a) his law firm's Trust Account Payment/Cheque Request form dated 31 July 2018;

[2] Letter from Mr JK to the Complaints Service (26 February 2021).
[3] Letter from Mr JK to the Complaints Service (13 April 2021).

(b) a copy of a letter from Ms M's lawyer dated 31 July 2018, attaching a copy of her firm's trust account deposit slip for the interim distribution;

(c) a copy of the trust account deposit slip itself.

Comment by Mr MC

[23] In a letter to the Complaints Service dated 8 March 2021, Mr MC made the following comments about Mr JK's response to his complaint:

(a) he did not see Mr JK's terms of engagement until Ms UV lodged the claim in the Disputes Tribunal in December 2020. That document was part of the bundle lodged by Ms UV with the claim.

(b) Mr JK was wrong to say that reimbursement of the Māori Land money from the stakeholder funds, "had a neutral effect". Because Mr JK reimbursed Mr MC from relationship funds, this ultimately affected the amount that he received.

(c) Mr MC did not agree with Mr JK's assessment that Ms M would receive more than the amount being held in his trust account. The High Court's appeal judgment notes that Ms M received approximately $120,000 more than she was properly entitled to.

(d) Mr JK never handed Mr MC an invoice. Mr JK did not say that there would be a further invoice.

(e) Ms M was not adequately cross-examined.

(f) Mr MC submitted that Mr JK did not issue an invoice at any time, because "he accepted he was negligent."

(g) Mr MC expected Ms M to contact him once she received his handwritten comments on the demand letter that he returned to her in May 2020.

Standards Committee decision

[24] The Committee described Mr MC's complaints about Mr JK's conduct as being "wide-ranging" but summarised them as follows:[4]

a) failing to deal appropriately with a mistaken Māori Land payment to Ms M;

[4] Standards Committee decision (2 November 2021) at [13].

b) made the interim distribution without instructions;

c) failing to follow instructions including failing to prepare Mr MC for cross-examination and failing to adequately cross-examine Ms M;

d) generally failed to competently represent Mr MC, requiring him to appeal the Family Court decision;

e) Mr JK's fees as represented by the 31 July 2018 invoice, were not fair and reasonable.

[25] The Committee identified the following conduct issues as arising:[5]

(a) did Mr JK act competently?[6]

(b) Did Mr JK provide Mr MC with Terms of Engagement?[7]

(c) Does the Committee have jurisdiction to consider the fees complaint, and if so, were the fees charged fair and reasonable?[8]

(d) Does any of Ms UV's or Mr JK's conduct fall short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer?[9]

[26] As well the Committee identified that the complaint about Ms UV included her conduct in connection with the steps that she took to recover the outstanding 31 July 2018 invoice.

Complaints about Mr JK's conduct:

The mistaken Māori Land payment to Ms M

[27] The Committee noted Mr JK's explanation that it was agreed by Ms M's lawyer, that Mr JK could apply the stakeholder funds towards reimbursing Mr MC for the mistaken payment to Ms M.

[5] At [20].
[6] Rule 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).
[7] Rule 3.4 of the Rules.
[8] Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.
[9] Section 12(1)(a) of the Act.

[28] The Committee concluded that this is what occurred, although it noted that Mr MC would have preferred the money to have been reimbursed directly to him by Ms M.

The interim distribution

[29] The Committee held that it was "satisfied that the interim distribution of funds was instructed and authorised by Mr MC [and that] this is clear from the email correspondence between [Mr MC] and Mr JK dated 7 August 2018".[10]

[30] Further, the Committee was satisfied that the interim distribution "formed part of the accounting between the parties in the division of relationship property as determined in [the Family Court and the High Court]."[11]

Acting on instructions (including cross-examination)

[31] The Committee said that it was "satisfied that Mr JK conducted the file as best he could and in difficult circumstances." The Committee described it as "a difficult file." [12]

Terms of engagement

[32] The Committee noted Mr JK's explanation that terms of engagement were generally sent to clients in the mail, though can occasionally be handed to them in person. Mr JK had further said that although he can't remember which of those two courses was adopted, Mr MC did receive terms of engagement.

[33] The Committee said that there was "nothing to gainsay Mr JK in this regard".[13]

Jurisdiction to consider fees

[34] The Committee noted that the invoice in question was dated 31 July 2018, and thus rendered more than two years before Mr MC lodged his complaint. It further noted that reg 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the SC Regs) prohibited inquiry into a bill of costs rendered two years before the date of the complaint, unless there were "special circumstances".

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[10] Standards Committee decision (2 November 2021) at [23].
[11] At [24].
[12] At [27].
[13] At [31].

[35] In deciding whether there were special circumstances, the Committee referred to Mr MC's submissions which were that he did not receive a copy of the invoice in question until 25 May 2020, when Ms UV sent her letter of demand.

[36] On the other hand, Mr JK said that he had handed the invoice to Mr MC at a meeting with him before the Family Court hearing in September 2018, and as time records showed that there had been such a meeting on 22 August 2018.

[37] In considering the invoice itself, the Committee said that it "did not consider that the overall level of charging was per se a special circumstance [and that there was] nothing to indicate that the fees were excessive for the work carried out or that they were in any way unjustified."[14]

[38] The Committee held that "the delay in bringing the complaint was significant, being 2.5 years" and that Mr MC had not provided an adequate explanation for that delay. It said that "all appearances point to the complaint being made as a reaction to [Mr JK] taking formal steps to recover [the fees]."[15]

[39] For those reasons, the Committee held that there were no special circumstances justifying inquiry into the fees.

Complaint about Ms UV's conduct

[40] Mr MC's complaint about Ms UV's conduct was that she had failed to follow Mr JK's firm's complaint process upon receipt of Mr MC's handwritten response to the letter of demand.

[41] The Committee noted that Ms UV had said that the issues contained in Mr MC's handwritten note on her letter of demand, had not previously been raised by him and so there had been no earlier complaint to the firm.

[42] Ms UV said that she was directed by her employer to lodge a complaint with the Disputes Tribunal, on the basis that this forum would better suit Mr MC.

[43] The Committee noted its earlier finding that Mr JK had provided Mr MC with terms of engagement, but said that Mr MC had not, in fact, made any complaint prior to receiving Ms UV's letter of demand.

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[14] At [36].
[15] At [37].

[44] The Committee held that "there is no bar on a firm commencing proceedings to recover outstanding invoices" and noted that Mr MC's concerns as to any liability to pay the fees, would be dealt with by the Disputes Tribunal.

[45] Accordingly, the Committee took no further action on the complaint about Ms UV's conduct.

Application for Review

[46] Mr MC lodged his review application in November 2021. He raised the following matters:

(a) Mr JK did not follow instructions and insisted that Ms M should return the Māori Land funds. By paying-out the equivalent amount from the stakeholder funds, Mr JK effectively paid Mr MC from Mr MC's own funds.

(b) Mr JK made the interim distribution without Mr MC's instructions to do so.

(c) Mr JK inserted a paragraph in a letter sent to Ms M's lawyer, referring to the interim distribution, without Mr MC 's knowledge or instructions.

(d) Mr MC has incurred costs in advancing an appeal to correct Mr JK's errors.

(e) Mr JK's cross-examination of Ms M during the Family Court hearing was inadequate. Mr MC was cross-examined by Ms M's lawyer for six hours, whereas Mr JK cross-examined Ms M for less than an hour.

(f) Mr JK failed to inform the Family Court Judge about the interim distribution.

(g) Mr JK did not correct errors in calculations contained in submissions filed by Ms M's lawyer, after the Family Court hearing.

(h) Mr JK did not provide a letter/terms of engagement.

(i) Mr JK did not give Mr MC the 31 July 2018 invoice, at any stage. Mr MC saw it for the first time when Ms UV wrote her letter of demand during May 2020.

(j) Immediately upon receiving the letter of demand, Mr MC challenged the invoice.

[47] By way of outcome, Mr MC seeks the return of fees paid to pursue his High Court appeal. He also asks that the Disputes Tribunal claim is dismissed.

Response by Mr JK

[48] Mr JK responded to Mr MC's review application in submissions dated 21 January 2022. In summary, Mr JK said:

(a) Mr MC has not suffered any loss as a result of the Māori land payment being reimbursed out of the stakeholder funds, rather than repaid directly by Ms M.

(b) Mr JK had suggested making the interim distribution, and Mr MC agreed. It was on the basis of those instructions that the interim distribution was made on 31 July 2018.

(c) Mr JK said that he was fully prepared for the Family Court hearing in September 2018. He made sure that Mr MC was also properly prepared for cross-examination.

(d) Mr JK said that he had neither "record [nor] memory of how the letter of engagement was supplied to Mr MC." It would either have been by ordinary post, or handed to Mr MC at their initial meeting.

(e) The 22 August 2018 meeting was for a little over one hour. Mr JK said that he anticipates that this was when he handed the 31 July 2018 invoice to Mr MC. There was a conversation to the effect that Mr MC "accepted liability for payment". Mr JK also told Mr MC that there would be a further invoice after the hearing.

(f) Mr MC did not raise any complaint or other conduct issues until steps were taken to recover the outstanding fees.

Comment by Mr MC

[49] Mr MC provided his comments about Mr JK's response to the review application, and an email to the Case Manager dated 28 June 2022.

[50] I intend no disrespect to Mr MC by not summarising those comments. They largely repeat what he has earlier said about the conduct issues raised by his complaint.

[51] In short, Mr MC emphatically denies instructing Mr JK to make the interim distribution.

Response by Ms UV

[52] Ms UV noted that the original complaint about her was "only a minor aspect of the substantive complaint."[16] She said that she was not acting for Mr MC, and was carrying out her employer's instructions to recover outstanding fees.

[53] Upon receiving Mr MC's handwritten comments, written on her original letter of demand, Ms UV spoke to her employers who instructed her to prepare and file a claim in the Disputes Tribunal.

[54] Ms UV also said that Mr MC had been given a copy of the law firm's terms of engagement, at the beginning of the retainer with Mr JK.

Hearing in person

[55] The review application was progressed before me at a hearing via the Microsoft Teams platform, on 7 July and 4 August 2022.

[56] Mr and Mrs MC appeared for the hearing. Mr JK had earlier indicated that he would be unable to attend. Ms UV also attended, in connection with the complaint about her conduct.

[57] During the hearing it became apparent that direct input from Mr JK in connection with some of the complaint and review issues, would be of assistance.

[58] Accordingly, I adjourned the review application part-heard, and asked the Case Manager to liaise with Mr JK to arrange a suitable date for the hearing to be resumed.

[59] On 8 July 2022, I issued a Minute to the parties, in which I summarised the issues to be considered on review, and posed a number of questions for Mr JK to answer.

[60] Mr JK provided submissions responding to that Minute, on 1 August 2022. He attached a number of relevant documents to those submissions.

[61] Mr MC provided a brief written response.

[62] The hearing resumed on 4 August 2022, again via the Microsoft Teams platform.

[16] Letter from Ms UV to the Case Manager (13 June 2022).

[63] Mr JK spoke of his written submissions and responded to questions from me. As well, Mr MC made further submissions, commenting on what Mr JK had said.

[64] I confirm that I have read Mr MC's complaint and accompanying material and Mr JK's response to that. I have also read the review applications and responses.

[65] As well, I have heard extensively from the parties, both of whom responded to questions from me.

[66] There are no additional issues or questions in my mind that necessitate any further evidence, information or submissions from either of the parties.

Nature and scope of review

[67] The nature and scope of a review was discussed by the High Court in 2012, which said of the process of review under the Act:[17]

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
>
> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[68] In a later decision, the High Court described a review by a Review Officer in the following way:[18]

> [2] … A review by [a Review Officer] is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee.
>
> …
>
> [19] … A "review" of a determination by a Committee dominated by law practitioners, by the [Review Officer] who must not be a practising lawyer, is potentially broader and more robust than either an appeal or a judicial review. The statutory powers and duties of the [Review Officer] to conduct a review suggest it would be relatively informal and inquisitorial while complying with the

[17] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41] (citations omitted).
[18] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475.

> principles of natural justice. The [Review Officer] decides on the extent of the investigations necessary to conduct a review in the context of the circumstances of that review. The [Review Officer] must form his or her own view of the evidence. Naturally [a Review Officer] will be cautious but, consistent with the scheme and purpose of the Act … those seeking a review of a Committee determination are entitled to a review based on the [Review Officer's] own opinion rather than on deference to the view of the Committee. That applies equally to review of a [decision] under s 138(1)(c) and (2) [of the Act].
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> [20] … While the office of the [Review Officer] does not have the formal powers and functions of an Ombudsman, it can be expected to be similarly concerned with the underlying fairness of the substance and process of the Committee determinations in conducting a review.
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> [21] A review by the [Review Officer] is informal, inquisitorial and robust. It involves the [Review Officer] coming to his or her own view of the fairness of the substance and process of a Committee's determination.

[69] Given those directions, my approach on this review has been to:

(a) independently and objectively consider all the available evidence afresh;

(b) consider the fairness of the substance and process of the Committee's determination;

(c) form my own opinion about all of those matters.

Discussion

Complaint about Ms UV's conduct

[70] At the conclusion of the hearing on 7 July 2022, I advised the parties that I would be confirming the Committee's decision to take no further action on the complaint about Ms UV's conduct.

[71] I confirmed that in the Minute issued to the parties on 8 July 2022.

[72] For completeness, I will reproduce below the relevant parts of that Minute, as encapsulating my reasons for confirming the Committee's findings about Ms UV:

> [8] Ms UV's involvement in Mr MC's case arose in about May 2020, some 18 or so months after Mr MC terminated his retainer with Mr JK. Ms UV was (and remains) a junior lawyer employed in Mr JK's law firm, and her supervising partner (not Mr JK instructed her to take steps to recover unpaid fees from various clients or former clients.
>
> [9] Included in the list was Mr MC's 31 July 2018 invoice, issued by Mr JK. Ms UV had not had any previous involvement with Mr MC's case; nor, indeed, did she work in Mr JK's team. Instructions to deal with Mr MC's unpaid invoice came from another partner in the law firm.
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> [10] Ms UV wrote a standard letter of demand to Mr MC in May 2020. Mr MC more or less immediately responded by returning the original letter with a

handwritten note to the effect that he had never received an invoice from Mr JK and that the invoice was challenged.

[11] On receiving her letter back, Ms UV was a little unsure about what steps to take next. Two or three months later, Mr JK and another partner in the law firm, Mr RG, spoke to her and told her that the most appropriate step to take, given Mr MC's challenge to the invoice, was to lodge a claim seeking recovery of the unpaid invoice in the Disputes Tribunal.

[12] Ms UV did precisely that, and those proceedings were served on Mr MC about a week before Christmas in 2020. On being served with those proceedings, Mr MC set about lodging his complaint with the New Zealand Law Society Complaints Service.

[13] The bulk of Mr MC's complaint concerned Mr JK's representation of him before and during the Family Court proceedings. Ms UV rated a relatively insignificant mention, largely in connection with the fact that she had written to Mr MC out of the blue, had then taken no steps for several months until the Disputes Tribunal claim was lodged during December 2020.

[14] Unsurprisingly, the Standards Committee resolved to take no further action in relation to Mr MC's complaint about Ms UV.

[15] When Mr MC lodged his review application in connection with the Committee's decision to take no further action on his complaint about Mr JK, he included Ms UV as part of that review application.

[16] At the hearing before me on 7 July, I asked Mr MC to articulate, as clearly as he could, what he thought Ms UV had done which was deserving of a disciplinary response.

[17] Mr MC's concerns about Ms UV were largely that Mr JK's law firm took almost two years (from the date of the invoice – 31 July 2018) to send him an invoice, and did so accompanied with a threat to take legal steps to recover the unpaid legal fees.

[18] After Ms UV had explained to me how she became involved, and noting that she was a relatively junior lawyer who was instructed to take certain legal steps by her employer, to his credit (and without too much persuasion from me) Mr MC acknowledged that there were no conduct or disciplinary issues on Ms UV's part.

Mr JK

[73] At the conclusion of the hearing on 5 August 2022, I informed the parties that I would be taking the following steps:

(a) That I would direct the Committee to reconsider Mr MC's complaint that Mr JK made the interim distribution without authority or instructions to do so.

(b) That I would direct the Committee to reconsider Mr MC's complaint about the 31 July 2018 invoice.

(c) That I would confirm the Committee's decision to take no further action against Mr JK in connection with the allegation that he failed to adequately cross-examine Ms M in the Family Court.

[74] I indicated that I would separately make a decision about the following issues:

(a) Whether Mr JK provided Mr MC with terms of engagement.

(b) The Māori land payment.

(c) Whether Mr JK prepared Mr MC for cross-examination in the Family Court hearing.

(d) Whether Mr JK's cross-examination of Ms M during the Family Court hearing, was competent.

(e) Whether Mr JK explained the provenance of the interim distribution to the Family Court judge.

(f) Whether Mr JK challenged calculations made by Ms M's lawyer in submissions filed after the September 2018 hearing.

[75] I will first deal with the matters identified in [73] above.

Authority for the interim distribution

[76] Mr MC's position has always been that Mr JK made the interim distribution without his authority.

[77] Mr JK's response is that Mr MC had agreed that the funds represented part of Ms M's entitlement, and that he gave instructions to make the transfer.

[78] Mr JK also said that Mr MC agreed that by making the interim distribution prior to the hearing, Ms M might be more inclined to consider a negotiated settlement.

[79] Mr JK said that on 26 and 27 July 2018 he had two lengthy meetings with Mr MC, during which he (Mr JK) suggested making the interim distribution.

[80] Mr JK said that Mr MC agreed with this suggestion and gave him those instructions.

[81] As well, Mr JK recalls that at a Case Management conference at the Family Court on 30 July 2018, there was further discussion between himself and Mr MC about the interim distribution, with instructions being confirmed.

[82] Mr JK said that he handed over his paper-based file relating to Mr MC to his new lawyer in early 2019, when the appeal was lodged against the Family Court's decision.

[83] A complete photocopy of the paper file was apparently not made and retained by Mr JK. However, he said that his firm retained electronically generated material from the retainer, such as emails, documents, pleadings and correspondence.

[84] Mr JK said that he was unable to locate any electronic record of Mr MC's instructions to make the interim distribution.

[85] However, Mr JK said that he could not exclude the possibility that he made a handwritten file-note of those instructions following any of the discussions with Mr MC on 26, 27 and 30 July 2018.

[86] That handwritten file-note may well be on the paper-based client file.

[87] On 31 July 2018 Ms M's lawyer wrote to Mr JK and said the following:

> Further to our discussions we now enclose a deposit slip for our trust account so that the funds you are holding on behalf of Mr MC can be paid to [Ms M] in part settlement of her relationship property claim. …
>
> This payment is accepted on the basis that all issues are still at large in terms of the status and value of chattels including motor vehicles together with all other transactions.

[88] Administratively, within his law firm Mr JK prepared a handwritten "Trust Account Payment/Cheque Request" form. On that part of the form headed "Authority For Payment (Describe Or "Attached")", Mr JK handwrote "Letter attached confirming client instructions."

[89] It is accepted that Mr JK arranged for the interim distribution to be made on 31 July 2018.

[90] Several days later, on 6 and 7 August 2018 Mr MC and Mr JK exchanged emails in connection with a draft letter to be sent to Ms M's lawyer. Mr JK has referred to the final letter which was sent, and said that it included a paragraph (approved by Mr MC) referring to the interim distribution.

[91] That paragraph read:

> As a gesture of good faith [Mr MC] agreed to hand over all the money currently held in Trust from the proceeds of the sale [of a vehicle] and the balance of the [closed bank account].

[92] For his part, Mr MC does not accept that he agreed to the insertion of this particular paragraph, in the final version of the letter that was sent to Ms M's lawyer. Mr MC maintains that this was inserted by Mr JK after Mr MC had approved the final version. Moreover, the paragraph had not been included in any of the earlier drafts.

[93] Mr JK denies that he inserted that paragraph without instructions to do so, and says further that the paragraph in question corroborates his belief that Mr MC had instructed him to make the interim distribution on 31 July 2018.

[94] Nevertheless, Mr JK acknowledged to me that the reference on the Trust Account Payment/Cheque Request form to "letter attached confirming client instructions", is incorrect.

[95] No letter was attached to that form, and Mr JK does not believe that one was drafted. Mr JK agrees that Ms M's lawyer's letter to him on 31 July 2018, could not be construed as "letter attached confirming client instructions".

[96] Thus, Mr JK relies on his recollection of discussions with Mr MC on 26, 27 and 30 July 2018 as forming the basis of his authority to make the interim distribution, together with the possibility that there may be a handwritten file note to that effect on the paper copy of his client file.

[97] The Committee dealt with this issue of complaint in relatively short order, by simply saying that it was:[19]

> satisfied that the [interim distribution] was instructed and authorised by Mr MC[and that] this is clear from the email correspondence between [Mr MC] and Mr JK dated 7 August 2018, which records [his] knowledge, authority and understanding of the bases upon which the payment was made….

[98] Mr JK had forwarded a copy of the Trust Account Payment/Cheque Request form to the Complaints Service, following a request to him by the Committee that he provide (amongst other things) "a copy of the client authority relating to the interim distribution…".[20]

[99] Despite having this form with the clear reference to an authorising letter, the Committee did not then ask Mr JK for a copy of that letter. It appeared to simply rely on correspondence which post-dated the interim distribution as providing sufficient evidence of Mr JK's instructions.

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[19] Standards Committee decision (2 November 2021) at [23].
[20] Letter from the Complaints Service to Mr JK (22 March 2021).

[100] With every respect to the Committee, it ought to have pursued inquiry as to the whereabouts of the authorising letter, or any other document dated before 31 July 2018, as evidence of Mr JK's instructions to make the interim distribution.

[101] It is difficult to see how documents created after the interim distribution was made could be seen as evidence of instructions to make the distribution.

[102] Because Mr JK has said that he cannot exclude the possibility that there might be a handwritten file note recording his instructions from Mr MC on either 26, 27 and 30 July 2018, to make the interim distribution, I consider that this issue must be returned to the Committee for reconsideration.

[103] Mr JK has said that he will endeavour to locate his paper file and provide a copy of any file note if such exists.[21]

[104] If there is no file note (or Mr JK cannot now locate his paper file), then the Committee will need to resolve the evidential dispute between Messrs MC and JK as to whether verbal instructions to make the interim distribution were given on any of those three days.

[105] I simply record that whereas Mr JK recalls those instructions being given, Mr MC denies doing so.

[106] As well, the Committee will need to consider the significance of the words "letter attached confirming client instructions" on the Trust Account Payment/Cheque Request form, when Mr JK has acknowledged that there was no such letter.

[107] It would seem to me, that this potentially engages amongst other issues, reg 12(6)(b) of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

31 July 2018 invoice

[108] The 31 July 2018 invoice was for $18,000, plus GST and disbursements. The total of the invoice was $21,435.29. The narration reads:

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[21] In an email to the Case Manager responding to further material that Mr MC had provided after the hearing, Mr JK said "I have made a further check for any file or electronic records and unfortunately I cannot locate any signed documentation or file note, prior to the making of the [interim distribution]." It is not entirely clear from Mr JK's comment whether he has managed to obtain his paper file, which was uplifted by Mr MC's new lawyer during the early part of 2019, and is referring to that file when he says that he could not find a file note. Because I am directing the Committee to reconsider the whole of the circumstances concerning the interim distribution, I will simply leave it for Mr JK to address the question of the paper file, at that time.

> Our costs re-all attendances in relation to relationship property from October 2016 to 31 July 2018 – sundry attendances, meetings, Court appearances, correspondence, advice and all incidentals.

[109] The invoice gives no indication as to how the figure of $18,000 has been arrived at; whether by time alone, or time plus or minus other factors.

[110] Mr MC said that he first saw the invoice when Ms UV wrote to him on 25 May 2020 seeking payment, together with overdue interest totalling $6,669.67.

[111] Mr MC said that he immediately challenged the invoice, by returning Ms UV's letter to her, with the following handwritten note on the bottom of it:

> No money was paid as no invoice was ever received. I had to employ other lawyers for this relationship case as I feel I have been misrepresented by this firm. I have no income or money at all, am on a benefit.

[112] Mr MC heard nothing further until served with proceedings that Mr JK's firm had lodged with the Disputes Tribunal, shortly before Christmas 2020.

[113] Mr JK said that although the invoice was generated on 31 July 2018, it was not sent to Mr MC either as an attachment to a letter or an email.

[114] Instead, Mr JK said that he handed the invoice to Mr MC at a meeting between the two on 22 August 2018. This meeting was approximately two weeks before the scheduled hearing of the proceedings and Mr JK said he told Mr MC that a further invoice would be issued, after the hearing.

[115] This differs from what Ms UV had said in her 25 May 2020 letter to Mr MC. She said that "[Mr JK] rendered an invoice on 31 July 2018 in the sum of $21,435.29."

[116] It is not entirely clear where Ms UV obtained that information, other than perhaps assuming that because the invoice was dated 31 July 2018 it must have been given (rendered) to Mr MC on that date as well.

[117] At the hearing before me Mr JK referred to a further invoice, saying that he believed it had been generated on or about 17 December 2020, in the net fees amount of approximately $11,000. He thought that it would have related to time and attendances after 31 July 2018, up to termination of his retainer.

[118] Mr JK was uncertain as to whether that invoice was ever actually issued to Mr MC.

[119] Mr MC said that he has never seen a second invoice and was only aware of the 31 July 2018 invoice.

[120] If a second invoice was generated, that did not occur until almost 2 years after Mr MC terminated his retainer with Mr JK (leaving to one side whether it was ever issued to Mr MC).

[121] There is a degree of uncertainty on Mr JK's part about any second invoice. That has never been the subject of complaint by Mr MC, because he was unaware that one had been issued.

[122] Whether Mr JK is able to now issue that invoice to Mr MC or endeavour to recover the unpaid fees it represents, is not for me to say. I would venture to suggest that the issues raised in doing so could be problematic for Mr JK.

[123] The only invoice for consideration by the Committee, was the 31 July 2018 invoice.

[124] The Committee found that Mr JK had indeed issued this invoice to Mr MC at their 22 August 2018 meeting. It held that Mr MC did not make his complaint about that invoice until January 2021, which was some two-and-a-half years after it had been issued.

[125] It was the Committee's view that Mr MC had not been able to establish that there were special circumstances justifying inquiry as to whether the fees represented by the 31 July 2018 invoice, were fair and reasonable.[22]

[126] Mr MC's review application repeats his complaint: he did not receive any invoice from Mr JK, at any time, and that the 31 July 2018 invoice was not given to him until Ms UV wrote to him in May 2020, at which time he immediately indicated challenge to it.

[127] Mr JK has said that he could not locate any contemporaneous documents to corroborate his evidence that he handed a copy of that invoice to Mr MC on 22 August 2018.

[128] At the hearing before me, Mr JK said that, despite any jurisdictional barrier presented by reg 29 of the SC Regulations, he consented to a direction by me to the Committee to consider whether the fees charged in the 31 July 2018 invoice were fair and reasonable.

[129] Clearly, Mr MC continues to invite inquiry into the fairness and reasonableness of those fees.

[22] Regulation 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008 (the SC Regulations).

[130] I am somewhat troubled by this state of affairs.

[131] On the one hand, I would have expected Mr JK to have made some record of the fact that he handed Mr MC a copy of an invoice, for net fees of $18,000, at a meeting on 22 August 2018.

[132] Even if this is what Mr JK did, I would have expected there to be some follow-up by him, such as attaching it to an email to Mr MC to ensure that there was a record of the invoice being given to him.

[133] On the other hand, it must have presented as unusual to Mr MC that Mr JK undertook reasonably significant legal work on his behalf yet never issued an invoice. Mr MC's explanation was that he thought that Mr JK had second thoughts about doing so given Mr MC's concerns about the quality of his legal work.

[134] I do not find that explanation convincing.

[135] As well, Mr JK could not recall being spoken to by his business partners about the unpaid invoice until Ms UV took steps in May 2020 to seek recovery of the unpaid fees. Nor could Mr JK say whether reminder invoices had been sent to Mr MC during that almost two-year period.

[136] On top of this, is the inconsistency between Ms UV's May 2020 letter referring to the invoice having been "rendered" to Mr MC on 31 July 2018, and Mr JK saying that although the invoice was generated on that date, it was not physically handed to Mr MC for another three weeks, on 22 August 2018.

[137] I am inclined to accept Mr MC's evidence that he did not see the 31 July 2018 invoice until Ms UV sent it to him on 25 May 2020, and that he immediately challenged it. I have come to this conclusion notwithstanding my reservations about Mr MC's somewhat unrealistic belief that Mr JK had elected to write-off all legal fees.

[138] Mr JK's approach to managing the invoice was somewhat casual. It was dated 31 July 2018, but for some reason not sent to Mr MC within the following day or so.

[139] It was, according to Mr JK, handed to Mr MC at a lengthy meeting on 22 August 2018 when the focus was on the approaching hearing.

[140] There was no record of any follow-up with him by Mr JK's business partners, querying long-standing unpaid invoices, or of reminders being sent to Mr MC. The first action was Ms UV's recovery letter on 25 May 2020.

[141] In putting it this way, I do not suggest that Mr JK had dishonestly said that he gave Mr MC the invoice on 22 August 2018.

[142] As indicated, I consider that Mr JK's approach to this invoice was casual and in reconstructing events once Mr MC's complaint was lodged, Mr JK assumed that he must have handed him the invoice on that date.

[143] What this means is that Mr MC's complaint about Mr JK's 31 July 2018 invoice was lodged within the two-year limitation period prescribed by reg 29 of the SC Regulations.

[144] Accordingly, I respectfully disagree with the Committee's conclusion about further inquiry into this invoice.

[145] I have given thought as to whether I should conduct a first-instance inquiry into the fairness and reasonableness of Mr JK's fees, as reflected by the 31 July 2018 invoice.

[146] However, to do so would deprive the parties of the relatively benign review rights from a Standards Committee determination, to a Review Officer. Challenge to any decision I might make about that invoice is to the High Court, under the Judicial Review Procedure Act 2016.

[147] For that reason, I am directing the Committee to consider afresh the question of whether the fees charged by Mr JK, as represented by his 31 July 2018 invoice, were fair and reasonable.

[148] In coming to this conclusion, I note that Mr JK has also consented to this course. However, I do not consider that the jurisdictional issue raised by reg 29 of the SC Regulations could be overcome by a consent order, as I have reservations about whether that would amount to the necessary "special circumstances".

[149] Nevertheless, Mr JK's willingness not to insist upon strict compliance with reg 29 of the SC Regulations tends to indicate that he could not exclude the possibility that he did not hand the invoice to Mr MC on 22 August 2018.

[150] In considering the invoice afresh, the Committee may consider that the appointment of a costs assessor would be beneficial.

[151] This is because the events to which the invoice relates all occurred in the middle part of 2018 – now some four years ago. Messrs MC and JK have quite differing recollections about meeting numbers and lengths, and clearly those issues are relevant to a consideration of whether the fees are fair and reasonable.

[152] A costs assessor will be able to interview both parties and obtain a reasonably detailed account from them as to relevant events.

[153] On that account, I note that in its decision the Committee said that Mr MC's complaint about Mr JK's fees, were that they were "not fair and reasonable by virtue of Mr JK's poor representation … in the [Family Court proceedings]".[23]

[154] To the extent that Mr MC's complaint was one about Mr JK's competence, I record at this point that I will be generally confirming the Committee's relevant conclusions about that.

[155] The only areas about which the Committee will be invited to consider matters afresh, will be in connection with the interim distribution, and the fairness and reasonableness of the fees in the 31 July 2018 invoice. That latter inquiry will not, therefore, consider the question of Mr JK's competence.

[156] I am also mindful that Mr JK will be endeavouring to locate his paper file in relation to the interim distribution issue, and naturally that file will be of some importance to any inquiry into the fairness and reasonableness of fees.

Cross examination of Ms M

[157] Mr MC said that he was cross-examined by Ms M's lawyer, for six or so hours. He contrasted that with Mr JK's cross-examination of Ms M, which he said was for less than one hour.

[158] Mr MC described his experience of cross-examination as being bruising and unrelenting. Conversely, he said that Mr JK appeared passive when he cross-examined Ms M.

[159] From this, reasons Mr MC, it can be concluded that Mr JK's cross-examination of Ms M was inadequate and thus not competent.

[160] It is approaching the trite to observe that effective cross-examination will be recognised by its quality, rather than by how long the cross-examiner keeps a witness in the witness box.

[161] Moreover, it would be wrong to assess the quality of one lawyer's cross-examination by reference to the length of time they took, compared with the time taken by opposing counsel.

[23] Standards Committee decision (2 November 2021) at [14].

[162] On that basis alone, I would be very reluctant to express any opinion about Mr JK's cross-examination of Ms M. Indeed, I would go so far as to say that disciplinary inquiry into a lawyer's cross-examination should never be triggered solely on the basis of a comparison of cross-examining times in a case.

[163] Nevertheless, it is often useful to obtain a sense of a lawyer's competence in cross-examination, by reference to the court's decision in the case. Sometimes a judge or other decision-maker will make some reference to a lawyer's cross-examination, either positively or negatively.

[164] Those observations are a much more reliable indicator of a lawyer's competence in the cross-examination task that they undertook before the judge or other decision-maker.

[165] On that account, having read the Family Court's judgment as well as the appeal judgment of the High Court, there are no judicial observations one way or the other about Mr JK's cross-examination of Ms M.

[166] If, for example, one of those judges considered that Mr JK's cross-examination was deficient to an extent that Mr MC's case had been compromised, one could reasonably expect there to be comment to that effect.

[167] Overall, I am quite satisfied that there are no conduct issues arising as a result of Mr JK's cross-examination of Ms M in the Family Court proceedings.

Remaining issues:

Terms of engagement

[168] Mr MC said that he never received written terms of engagement from Mr JK. He said that the first time he saw Mr JK's terms of engagement was as part of a bundle of documents submitted to the Disputes Tribunal by Ms UV in December 2020.

[169] In responding to Mr MC's complaint, Mr JK attached a copy of his letter of engagement dated 17 October 2016, and said:

> Our usual practice is to send these letters out to the clients by mail at the time of the engagement. Sometimes I would give the letter to the client at the time of the first meeting, depending when that took place. I cannot remember which course was taken in this instance, but either way, we believe that the letter was provided to [Mr MC].

[170] In written submissions provided before the hearing on 4 August, Mr JK said the following:

> I am unable to locate any file note or document which would verify how the letter of engagement may have been sent or given to [Mr MC].
>
> Therefore I am unable to say with any certainty that Mr MC received the letter of engagement, the matter was never drawn again to my attention, nor do I recollect any request from [Mr MC] to provide clarification of the terms of engagement.

[171] Mr JK's inability "to say with any certainty that Mr MC received the letter of engagement", does not inspire any confidence at all.

[172] On the basis of that evidence alone, I am satisfied on the balance of probabilities that Mr JK did not provide a letter/terms of engagement to Mr MC, prior to undertaking legal work on his behalf.

[173] Rule 3.4 of the Rules requires a lawyer to provide their client, in advance (i.e. prior to commencing work under a retainer) with "client information on the principal aspects of client service" including the basis for charging fees, professional indemnity arrangements, Lawyers' Fidelity Fund coverage and procedures for handling complaints.

[174] This rule has been in force for 12 years. I would suggest that it is not only well-known by all practising lawyers, but equally well understood by them. Its rationale is to give practical effect to the principle of consumer protection, which underpins the Act.[24]

[175] I accept that it is likely that Mr JK arranged for a letter of engagement to be generated at the time of, or shortly after, his initial instructions from Mr MC.

[176] Mr JK is an experienced lawyer in a well-established law firm, and I imagine that there are systems in place to ensure that a letter of engagement is at least generated as a first step.

[177] I do not consider this to be a case where Mr JK has simply failed to turn his attention to that question. However, ensuring that a letter of engagement is generated is only a very small part of the process. It must, of course, be given to the client.

[178] Mr JK's approach appears to be that it is either sent in the ordinary mail, or handed to his client. Either way is perfectly satisfactory, but there must be some evidence to support which approach was taken.

[179] If a letter of engagement is physically handed to a client, then it would be a very simple matter of asking the client to sign a copy to be placed on the file.

[180] As indicated, I am satisfied on the balance of probabilities, that Mr JK did not give Mr MC a copy of his letter/terms of engagement, at any time during the retainer.

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[24] Section 3(1)(b) of the Act.

[181] This is a breach of r 3.4 of the Rules, and pursuant to s 12(c) of the Act, is unsatisfactory conduct.

[182] If these events had occurred within a very short time after the Act and the Rules came into force, then I would have simply noted Mr JK's breach of the Rules, but not made a finding of unsatisfactory conduct. I would have accepted that the need to provide terms of engagement in writing in advance of a retainer, was a new requirement and that lawyers could perhaps be given some leeway in adjusting to it.

[183] However, as indicated by me above, this rule has been in force for now over 12 years. During that time I have no doubt that Mr JK and his business partners will have acted for hundreds of clients and I would hope that on each occasion, r 3.4 has been followed.

[184] I cannot extend any leeway to Mr JK, for those reasons.

[185] My finding that Mr JK did not give Mr MC a copy of any terms of engagement is based upon Mr JK's own evidence that he could not be certain that this had occurred. Thus, Mr JK really has no one but himself to blame for the fact that this has led to a finding of unsatisfactory conduct against him.

[186] As to penalty, I consider that a fine of $1,000 appropriately reflects the overall seriousness of this finding.

The Māori land payment

[187] There is agreement that Ms M wrongly received a rental payment in respect of Māori land owned by Mr MC, and which was clearly his separate property.

[188] It seems also to be the position that Ms M's lawyer recognised this.

[189] Mr JK endeavoured to seek repayment of that directly from Ms M, through her lawyer.

[190] It appears to be the case that Ms M was completely uncooperative. Both Messrs JK and MC also seem to agree that Ms M's lawyer, although acknowledging the error, was not much interested in pursuing the matter with her client.

[191] Agreement was reached between Mr JK and Ms M's lawyer, whereby the stakeholder funds could be utilised and the rental payment equivalent paid out to Mr MC from those funds.

[192] Mr MC was not necessarily happy with this suggestion, preferring instead that Ms M should somehow be forced to make the payment directly. Nevertheless, it is plain that Ms M was simply not interested in cooperating.

[193] The agreement made between the lawyers presents as being sensible in the circumstances. Mr JK rightly made the point that continuing to insist that Ms M must repay the funds, was something of an expensive exercise in futility.

[194] Mr MC seems to think that because he was reimbursed his separate property (the Māori land payment) from relationship money (the stakeholder funds), he has effectively paid himself and that Ms M has not had to account for the error.

[195] Mr JK disagrees, and said that Mr MC was not disadvantaged by the steps taken, and Ms M did not benefit.

[196] I have some difficulty in understanding Mr MC's argument.

[197] This does not appear to have been an issue raised by Mr MC in his appeal against the Family Court's judgment. There is reference to this issue in the appeal judgment, as follows:[25]

> [73] [Ms M] accepts that she has received Māori Land rentals that were the separate property of Mr MC in the amount of $5,182. On the other side of the ledger, there is no challenge to the Family Court judge's finding that Mr MC applied $16,500 advance to him by [Ms M] for the purposes of discharging a personal debt.

[198] Notably, there is no criticism by the High Court of the way in which Mr JK (and Ms M's lawyer) dealt with the Māori land payment.

[199] In all of the circumstances, I am not persuaded that any conduct issue arises in connection with the Māori land payment.

Preparing Mr MC for cross-examination

[200] Mr MC said that during the retainer with Mr JK, and before the hearing in the Family Court in September 2018, in discussing cross-examination Mr JK had said that he would conduct a "mock court" and cross-examine Mr MC to demonstrate what he might expect at the hearing.

[201] Mr MC said that the "mock court" dress-rehearsal, was never mentioned again and did not occur.

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[25] *MC v M* [20XX] NZHC XXX, per [CL] J.

[202] Indeed, Mr MC said that Mr JK did not have any further discussion with him at all, about what he might expect by way of cross-examination. In short, he said that he had no advice or other preparation for that part of the case.

[203] It was Mr MC's view that if Mr JK had followed through with the "mock court" suggestion, he (Mr MC) would have been far more prepared for cross-examination by Ms M's counsel. As I have recounted above, Mr MC said that the experience was unexpected and deeply unpleasant.

[204] For his part, Mr JK said that he does not recall making a "mock court" suggestion to Mr MC at any time, saying that this was not something that lawyers in his firm would tend to offer a client.

[205] Mr JK said that he prepared Mr MC for cross-examination by telling him to make sure that he understood the question that was being asked, to seek clarification if he did not understand the question, to make sure that he only answered the question that was being asked and to take his time with his answers.

[206] My observation is that lawyers are increasingly making use of a kind of "mock court" process to prepare their client and witnesses for cross-examination. At one end of the spectrum, this can include using a room set up like a courtroom, having a "mock judge" and taking the client/witness through comprehensive cross-examination.

[207] At the other end of the spectrum, many lawyers will simply "role-play" aspects of cross-examination across a desk or meeting room table.

[208] Mr JK's approach is to provide the standard advice described by me above at [205].

[209] To that list of advice I would add that a client should also be told to make sure that they are given an opportunity to provide a complete answer to any question asked in cross-examination. This would include, when appropriate, insisting that a question is not capable of a binary "yes/no" answer, as is frequently demanded by a cross examining lawyer.

[210] There is a danger in over-using a "mock court" or role play process. If a cross-examining lawyer learns that the witness has been put through such a process, there is room to suggest that the witness has had words put in their mouth, or has learned their answers much as an actor might learn their lines.

[211] This can potentially diminish a witness's reliability and credibility.

[212] So, lawyers must take care when preparing their client or a witness for cross-examination, to ensure that they do not suggest what answers to give to particular questions.

[213] Mr JK's approach is conventional though perhaps erring a little too much on the side of caution. I am not suggesting that this remotely gives rise to a conduct issue on his part. However, from a client management perspective there is perhaps some merit in a lawyer going a little further and possibly suggesting topics for their client/witness that may arise in cross-examination, and suggesting that a thorough knowledge of their brief of evidence will be essential when dealing with those topics.

[214] It would be quite wrong of me to conclude that Mr JK's approach to preparing Mr MC for cross-examination was so inadequate that it led to Mr MC being unable to properly advance his evidence, with the result that the court's decision was unfavourable to him.

Family Court not told about the interim distribution

[215] As well as complaining that Mr JK was not instructed to make the interim distribution, Mr MC complains that the fact that it was made was not drawn to the attention of the Family Court Judge and therefore not taken into account by her when assessing relationship property shares.

[216] Earlier in this decision I have directed the Committee to reconsider the issue of whether Mr JK had been instructed to make the interim distribution.

[217] As to whether Mr JK informed the Family Court Judge about the interim distribution, I refer to three relevant documents:

(a) First, in his written opening submissions for the hearing in the Family Court, Mr JK said the following:

> [54] [Mr MC paid $135,000 into Mr JK's law firm's trust account]. [Ms M] received a distribution of relationship property in the form of a payment from [Mr JK's firm's trust account] being a total of $345,303.24.
>
> …
>
> **Orders Sought by [Mr MC]**
>
> [56] [Ms M] will retain the sum of $345,303.24 as her separate property.

(b) Secondly, in further submissions dated 5 October 2018, and filed by Mr JK after the hearing had been completed, he said the following (Mr JK's further submissions):

> [3] … Late in 2006 the remaining balance of [Mr MC's HSBC account] was paid into [Mr JK's firm's trust account] … and this formed part of the payment of $345,303.24 made to [Ms M] as an interim distribution.

(c) In a schedule attached to the further submissions, and forming part of it, Mr JK attributed to Ms M as either relationship property held or retained by her, the following:

Funds paid as interim distribution (derived from balance of HSBC account funds held in [Mr JK's firm's trust account] and sale of [vehicle])	$345,303.24

(d) Thirdly, in a document called "Brief Of Further Evidence – [Mr MC]", Mr MC gives the following evidence:[26]

> [29] [Two vehicles] were sold [and the sale proceeds were lodged in Mr JK's firm's trust account] and this is included in funds which have been paid to [Ms M] in the sum of $345,303.24 as a relationship property distribution.

[218] The Family Court's judgment does not refer to the interim distribution. However, that is not the same as saying that it had not been drawn to the judge's attention.

[219] As is apparent from the three documents I have referred to above, there was an abundance of evidence before the Family Court judge about the interim distribution.

[220] I cannot discern any conduct issue on Mr JK's part, in connection with this issue.

Failure to challenge submissions filed by Ms M's lawyer after the Family Court hearing

[221] It appears to be the case that, whether solicited or not, Ms M's lawyer made further written submissions to the Family Court judge after the hearing had been concluded.

[222] In those submissions, Ms M's lawyer attached a document which was apparently a valuation prepared by professional Auctioneers and Valuers, and dated "3 July 2015 and Updated 19 September 2018" (the valuation).

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[26] That brief of evidence is undated, and the copy before me unsigned, though Mr JK has said that it would undoubtedly have been filed and served, before the Family Court hearing began on 10 September 2018. Mr JK said that at a Case Management Conference on 30 July 2018, leave had been given to the parties to file further evidence before the hearing. It is inconceivable that Mr MC would not have been aware of the brief of evidence, before the hearing began.

[223] The valuation related to chattels, vehicles and livestock.

[224] The valuation appeared to suggest that Ms M was due an "equalisation payment" of $117,950.

[225] Mr MC immediately instructed Mr JK to challenge the valuation (indeed, it is now Mr MC's view that the valuation had been forged).

[226] Mr MC maintains that Mr JK failed to follow his instructions to challenge the valuation. He said that Mr JK commented that they "should not worry [as] the Judge will see through it as nonsense."

[227] Mr MC said that on the contrary, the Family Court Judge adopted the valuation, noting that the parties had agreed that Mr MC would pay Ms M the sum of $117,950.[27]

[228] Again, reference to contemporaneous documents assists in resolving this issue.

[229] In Mr JK's further submissions, he quite clearly argues the following:

> [13] [Ms M] has already received assets in excess of one half share [and that] while the amount received by [Ms M] is greater than that retained by [Mr MC], [he] does not seek any adjustment…

[230] Those submissions were responding to Ms M's lawyer's submissions, to which she had attached the valuation.

[231] Moreover, in the High Court's appeal judgment, the court said the following:

> [64] Mr MC challenges [the Family Court judge's conclusion that the parties had agreed that Ms M was owed $117,950, and her direction to that effect] on the basis that the Judge erred in treating the parties as having reached agreements to that effect.
>
> [65] Claims to a division of family chattels were the subject of submissions filed with the Family Court after the substantive hearing. The Judge took from [Ms M's] post-hearing submissions that agreement had been reached on the terms reflected in the judgment. Further submissions filed with the District Court on Mr MC's behalf disputed that position. On appeal, counsel argued on Mr MC's behalf that the orders in respect of chattels needed to be revisited because they were based on a misunderstanding that agreement had been reached.

[232] Again, it is difficult to understand Mr MC's complaint that Mr JK failed to follow instructions to challenge the valuation. Both the contemporaneous document (Mr JK's further submissions) and the judgment of the High Court confirm that Mr JK did indeed challenge the conclusion in the valuation that Ms M was owed a further $117,950.

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[27] *MC v M* [20XX] NZFC [XXX] at [xx].

[233] Mr MC has repeatedly made the point that it was necessary for him to appeal the Family Court's decision, because of Mr JK's inadequate representation. Mr MC points, in particular, to the Family Court judge's erroneous adoption of the valuation, leading her to direct him to pay Ms M $117,950.

[234] Mr MC argues that this came about because Mr JK did not sufficiently – indeed at all – challenge the valuation.

[235] It is clear that Mr MC succeeded in his appeal about this part of the Family Court's judgment.

[236] However, I do not accept that the Family Court's error in finding that the parties had agreed to the adjustment, was caused by anything that Mr JK did, or did not, do.

[237] First, there is no suggestion in the High Court's appeal judgement that the court held any concerns about Mr JK's overall representation of Mr MC. More specifically, when dealing with the valuation and the equalisation direction that the Family Court had made, the High Court did not remotely suggest that Mr JK had contributed to the Family Court Judge's error.

[238] Following the hearing before me, Mr MC forwarded the Case Manager the High Court's recently released decision on costs in the appeal.[28] Mr MC submits that this judgment corroborates his view that Mr JK's inadequate representation led to the need for him to appeal the Family Court's decision.

[239] With every respect to Mr MC, I do not read the costs judgment in that way at all.

[240] In the costs judgment, the High Court referred to the valuation and chattels issue as having been resolved on appeal following "receipt of new and more accurate information."[29] Again, there is no suggestion that this was information that Mr JK ought to have been aware of, and put before the Family Court Judge.

[241] Moreover, as recorded by the judge in the costs judgment, [BL] J (who had heard the appeal) described the chattels ground of appeal as being "messy and difficult [requiring] evidence, significant submissions and was likely the subject of a not small amount of research in unpicking the finances."[30]

[242] It is also important to note that in the costs judgment, the High Court described Mr MC's lawyer as having submitted that "Mr MC had no option but to appeal to correct

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[28] *MC v M* [20XX] NZHC XXXX, per [A] J.
[29] At [9].
[30] At [32] of the costs judgment.

the imbalance created by the Family Court [in connection with the equalisation payment]."[31]

[243] It does not appear that Mr MC's lawyer argued that Mr JK was responsible for the imbalance created by the Family Court.

[244] Whilst it has been acknowledged that Mr MC was right to advance an appeal which included challenging the Family Court Judge's equalisation direction, it does not follow that this was necessary to correct any errors or omissions, or other lack of competence, on the part of Mr JK.

[245] I cannot discern any conduct issues in relation to this issue of complaint.

Decision

[246] Pursuant to s 211(1)(a) of the Act, the decision of the Committee is:

(a) Confirmed as to the decision to take no further action on the complaint about Ms UV's conduct.

(b) Reversed as to the decision to take no further action on the complaint concerning the interim distribution. The Committee is directed to reconsider that issue of complaint.

(c) Reversed as to the decision to take no further action on the complaint concerning the 31 July 2018 invoice. The Committee is directed to consider whether the fees charged in that invoice, are fair and reasonable.

(d) Reversed as to the decision to take no further action on the complaint that Mr JK failed to give Mr MC terms of engagement before or at the commencement of the retainer. In its place I find Mr JK guilty of unsatisfactory conduct for breaching r 3.4 of the Rules by failing to provide Mr MC with client information on the principal aspects of client service.

(e) Confirmed as to the decision to take no further action on the complaint about the Māori Land payment.

(f) Confirmed as to the decision to take no further action on the complaint about cross-examination (including preparing Mr MC and cross-examining Ms M).

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[31] At [14].

(g) Confirmed as to the decision to take no further action on the complaint that Mr JK did not inform the Family Court about the interim distribution.

(h) Confirmed as to the decision to take no further action on the complaint that Mr JK failed to challenge submissions made by Ms M's lawyer after the conclusion of the Family Court hearing.

Costs on review

[247] When a Review Officer makes an adverse finding against a practitioner, costs will be ordered in accordance with the Costs Orders Guidelines of this Office. It follows that Mr JK is ordered to pay costs in the sum of $1,200 to the New Zealand Law Society by 5pm on Friday 30 September 2022, pursuant to s 210(1) of the Act.

Enforcement of money orders

[248] Pursuant to s 215 of the Act, I confirm that the money orders made by me in this decision may be enforced in the civil jurisdiction of the District Court.

Anonymised publication

[249] Pursuant to s 206(4) of the Act, this decision is to be made available to the public with the names and identifying details of the parties removed.

DATED this 19th day of August 2022

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R Hesketh
Legal Complaints Review Officer

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

Mr and Mrs MC as the Applicants
Mr JK as the Respondent
Ms UV as the Respondent
Mr DM as a related person
[Area] Standards Committee [X]
New Zealand Law Society