LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2023] NZLCRO 094

Ref: LCRO 069/2021

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	**ID** Applicant
AND	**KZ and UG** Respondents

DECISION

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

Introduction

[1] Over nine years ago, in June 2014, Mr KZ and Ms UG (the complainants) made a complaint to the New Zealand Law Society Lawyers Complaints Service (NZLS) about the professional conduct of Mr ID.[1]

[2] Mr ID had acted for the complainants in respect of some litigation matters between October 2013 and March 2014.

[3] The complaint was the subject of a determination by the [Area] Standards Committee [X] (the Committee) in December 2014. Mr ID applied to this Office for review of that determination.

[1] NZLS file number 11584.

[4] Mr ID's application for review was the subject of a decision of this Office, after a long delay, in July 2018 (the first LCRO decision).[2] In that decision, the LCRO directed the Committee to:

(a) reconsider and determine the complainants' complaint about all invoices referred to in the Committee's determination; and

(b) reach a decision on whether Mr ID's fees and disbursements invoiced by him to the complainants were fair and reasonable for all of his attendances provided to the respondents.

[5] The Committee duly reconsidered that aspect of the complaint and issued a further determination in April 2021 (the fees decision). In that decision, the Committee determined that Mr ID's fees were not fair and reasonable to both parties for the purposes of r 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[6] Mr ID seeks review of that decision.

[7] There has been unacceptable delay in the consideration of Mr ID's application for review owing to the case backlog in this Office, for which I apologise on behalf of this Office. I note that the Committee recorded in the fees decision:[3]

> Mr ID stated that fees of $11,768.51 remained outstanding. If that remains the case, it would appear no refund is necessary.

[8] On the assumption that this remains the factual position today and although this is not an excuse for delay, I note that the complainants have not been financially disadvantaged while awaiting a decision on Mr ID's review application. Any disadvantage, subject to the outcome of the review, has been to Mr ID.

[9] Throughout this decision I refer to "the complainants", being both Mr KZ and Ms UG. There has been no separate evidence or submission from Ms UG at any stage in the nine-year history of this matter to date.

[10] Mr ID has questioned whether or not Ms UG intended to be a party to the complaint at all. I have some concern that her only contribution to the entire complaint and review process has been a solitary signature on the original complaint form in 2014 and that the more recent confirmation of her participation was not from her but from Mr KZ.

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[2] *ID v KZ & UG* LCRO 35/2015.
[3] At [51], citing [14] of Mr ID's letter to the NZLS (14 August 2014).

[11] The complaint ultimately relates to the legal and commercial interests of the [R Family Trust] of which Ms UG was a trustee when the complaint was made. In the absence of advice to the contrary, I have presumed that she stands with Mr KZ in the pursuit of the original complaint and the response to Mr ID's application for review.

Background

[12] The factual background to the original complaint is not fully set out here but is touched on in this decision as required. The parties are of course fully familiar with it and it has been set out in sufficient detail in the combination of the December 2014 Committee determination and the first LCRO decision.

[13] The reason the Committee was directed to reconsider the fees issue was, in summary, that:

(a) the original complaint was just about the fourth of five invoices issued by Mr ID;

(b) at a late stage in the Committee inquiry process, the complainants expanded their complaint to encompass all five invoices;

(c) the Committee decided that the principles of natural justice did not allow it to consider the other four invoices at that stage in its inquiry process;

(d) it concluded that the fees charged in the fourth and fifth invoices were not fair and reasonable for the purposes of r 9 of the Rules;

(e) rather than reducing or cancelling the fees charged, the Committee awarded the complainants compensation of $15,000;

(f) the LCRO considered that the Committee should have reviewed all five of Mr ID's invoices and, to that end, should have either postponed the hearing of the original complaint or treated the complainants' challenge to the earlier invoices as a separate complaint to be considered together with or separately from the original complaint;

(g) the LCRO also considered that the Committee's award of compensation was inappropriate because the LCRO was not satisfied that there was a clear causative link between Mr ID's conduct and the loss claimed by the complainants;

(h) in directing the Committee to reconsider the fees aspect, the LCRO explained that this was expressly to preserve the parties' respective rights of review to this Office on that matter.

[14] The procedural outcome is that the Committee made its fees decision and Mr ID has exercised his right of review that was preserved by the first LCRO decision.

The complaint

[15] The complainants originally complained firstly that they "were charged $13,826 for unnecessary work resulting from incorrect advice regarding service" and secondly that "we were not advised of a rate increase from $350 to $400 which resulted in a $4,000 overcharge".

[16] The second element of the complaint was resolved at an early juncture. Mr ID adjusted his later invoices by a total of $4,043 + GST to reflect the $350 original hourly rate.

[17] The first element of the complaint was premised on various assertions about Mr ID having failed to act competently and in a timely manner consistent with the duty to take reasonable care for the purposes of r 3 of the Rules.

[18] Both the Committee in its first determination and my colleague in the first LCRO decision found that Mr ID had indeed breached r 3 and that his conduct was thereby unsatisfactory for the purposes of the Rules. By reason of the first LCRO decision, that finding became final.

[19] By reason of the reconsideration direction made by my colleague in the first LCRO decision, the issue of the fairness and reasonableness of all Mr ID's fees was reopened.

The finding of breach of r 3 of the Rules

[20] Although not wishing to record the full factual background, I need briefly to explain the basis of the finding of breach by Mr ID of r 3 of the Rules. Otherwise, discussion of the fairness and reasonableness of Mr ID's fees will have no context.

[21] The complainants had been served with bankruptcy notices. They instructed Mr ID to apply to have the notices set aside. Those applications needed to be filed and served within a statutory timeframe. Mr ID was responsible for drafting, filing and serving the applications.

[22] The applications were filed but not served within the statutory timeframe. This occurred twice on different dates, once in relation to Mr KZ and once in relation to Ms UG. As a consequence, Mr KZ and Ms UG committed acts of bankruptcy.

[23] The LCRO's critical finding was expressed as follows:

> [A]lthough Mr ID was working under time constraints not necessarily of his own making, on [both dates], there were options open to him that he did not either consider or take to meet the deadline. The High Court has stated that whilst the rules are to be "applied as specifically as possible", they are "also to be applied as sensibly and fairly as possible". Following this approach, and from my analysis, the conclusion I have reached is that by not serving the applications within the stipulated time permitted, Mr ID contravened r 3.

[24] There were other aspects of the complaint in respect of which my colleague found that a need for professional conduct findings adverse to Mr ID did not arise, with one arguable exception discussed later in this decision.

[25] Mr ID argued that the finding of breach of r 3 for his failure to serve the applications within the stipulated time frame should have no bearing on assessment of the fairness and reasonableness of his fees. He argued that the complainants still had their applications to set aside the bankruptcy notices heard by the High Court on their merits, the applications were unsuccessful on the merits and therefore his fee would have been incurred regardless of the error in service.

[26] The Committee rejected this argument and, on that basis, awarded $15,000 compensation to the complainants. On review, as noted above, my colleague reversed the compensation award because of the absence of a clear causative link between Mr ID's error and any loss suffered by the complainants and directed the Committee to reconsider the fees issue.

The costs assessment

[27] In considering the fairness and reasonableness of Mr ID's fees for the second time, the Committee resolved in August 2018 to appoint a costs assessor. The practical difficulty with taking this step is that few practitioners make themselves available as costs assessors, their work is voluntary but time-consuming and costs assessments can therefore take considerable time. This was certainly the case in this instance.

[28] The costs assessor, a senior practitioner, requested and was provided with Mr ID's file. He also requested Mr ID's time records. Mr ID advised that his time records had been destroyed as a result of a change from a manual, hardcopy timesheet system to an electronic system in 2015.

[29] Although the costs assessor considered this explanation to be less than satisfactory given that Mr ID had an outstanding fees complaint against him at the time the time records were destroyed, he did not consider the lack of time records to be critical given that:

(a) Mr ID's file appeared to be complete;

(b) there were reasonably detailed narrations on the invoices corresponding to the tasks observable from the file;

(c) the essence of the complaint did not relate to whether the work was undertaken or the level of effort required "but rather whether all the steps were part of a competently conceived approach to the litigation and whether those steps were competently handled by Mr ID".

[30] Although Mr ID said that his time records had been destroyed, he provided the costs assessor with the following total hours for the five invoices:

25 October 2013	12.14 hours
6 December 2013	22.37 hours
18 February 2014	29.08 hours
12 March 2014	29.4 hours
15 April 2014	6.4 hours

[31] The costs assessor noted that there was no material criticism by the complainants about Mr ID's hourly rate,[4] time recording, duplication or fee calculation matters, or the hours spent undertaking the tasks that were completed by him in the litigation. He then addressed the reasonable fee factors set out in r 9.1 of the Rules that he considered relevant to the circumstances.

[32] Summarising the costs assessor's opinions;

(a) he considered the time and labour expended by Mr ID to be appropriate and reasonable;

(b) he considered Mr ID had the necessary skill and specialised knowledge to handle the litigation;

(c) he considered the matter to be "of some importance to the complainants";

[4] Apart for the change of hourly rate that was not notified to them.

(d) he considered that, although there was some urgency involved, that urgency should not have had any great impact on the fees;

(e) although he did "… not consider the matter to be highly complex, it did involve a number of interrelated facets which, when combined, created the need for careful formulation of a legal strategy. This situation was made more complex by the complainants' inability to readily meet the sealed judgment debt".

(f) He considered there was a reasonable level of risk and the transactions undertaken by Mr ID and commented that:

> Given the complainants' financial situation when faced with the judgement debt there were clearly significant potential adverse consequences faced by them. These extended to potential bankruptcy and/or sale of significant business assets to meet this judgement as well as further exposure to costs awards where litigation was unsuccessful. This risk was compounded by the potential for actionable claims against the complainants' previous lawyers, and the potential to compromise those claims through missteps in the subsequent litigation handled by Mr ID.

(g) He considered that Mr ID had the experience and expertise required to handle the litigation and that his hourly rate was appropriate for that experience and expertise;

(h) there was no fixed fee or conditional retainer arrangement;

(i) the reasonable costs of running a practice reflected in Mr ID's hourly rate;

(j) "if the services had been undertaken to an appropriate standard then they would have been considered to be within the market range for these services".

[33] The above summarised comments traverse all the applicable reasonable fee factors set out in r 9.1 except "results achieved". It was this reasonable fee factor that was the focus of the costs assessment. This was to be expected, given the Committee's finding, affirmed by this Office, that Mr ID had breached r 3 by reason of failing to serve the complainants' applications to set aside the bankruptcy notices within the statutory timeframe, and the consequences of that failure for the complainants.

[34] The costs assessor also addressed one other aspect of the complaint that had been the subject of somewhat ambiguous treatment in the first Committee decision and the first LCRO decision. This related to Mr ID's pursuit of an application for recall of a High Court summary judgment entered against the complainants.

[35] The circumstances were that Mr ID was first instructed by the complainants after summary judgment had been entered against them in a civil matter and after the appeal period had expired. Mr ID pursued an application for recall of the High Court judgment rather than an application for leave to appeal out of time.

[36] The Committee considered Mr ID's advice to pursue an application for recall to have been "misguided" but did not make an unsatisfactory conduct finding against him on that basis. No such finding having been made, it was not an issue on review and the complainants' submissions on review were confined to the issue of the service of the applications to set aside the bankruptcy notices out of time.

[37] The complainants' belated request for assessment of the fairness and reasonableness of all Mr ID's fees nevertheless triggered an assessment of the fees charged for the work on the application for recall, which was unsuccessful, and the subsequent application for leave to appeal out of time, which was also unsuccessful. The costs assessor therefore gave consideration to the matter.

[38] His relevant comments included the following:

> While the original Committee described the decision to seek review rather than leave as misguided it is unclear from this original decision how extensively it considered this matter and more importantly the extent this conclusion would have seen it determine a fee reduction had it continued to address that issue.
>
> In my assessment it seems clear in hindsight that an application for leave to appeal out of time would have been better than recall. Indeed, that would have been the conventional approach where the judgement had been sealed. To this extent it could be said there is a justification for the fees relating to this stage of the litigation being revisited.
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> Tempering this view is the fact that whatever the steps required there was a need to come to grips with the file and address the judgement application to examine the Trustees. The file also reveals there was confusion, it seems at least in part as a result of advice from the complainants' previous lawyers, about the extent of the personal liability of the Trustees. To that extent the work undertaken towards the recall, even if indirectly, confirms that this was the effect of [judge C]'s judgment. This fact, along with the lack of significant criticism of Mr ID by the Associate Judge and the caution required when considering judgement calls after the event tempers my view of Mr ID's approach.
>
> Considering all of these steps I have concluded on balance that the outcome achieved cannot be considered to be satisfactory in relation to the inadequacies in respect of service only.
>
> …
>
> While the Committee described the decision to seek recall as misguided it made no formal adverse findings. Taking this into account, but also considering the matter independently, in my view any deficiency in this step was not so significant as to warrant fees revision. This is particularly the case given the timing of Mr ID's initial instructions and the clarification of position these proceedings gave to the complainants.

> Similarly, I do not believe that the decisions relating to the application for leave to appeal are so deficient as to warrant revision of Mr ID's fees. As I have set out above, I cannot confidently conclude that this step did not form some function in the subsequent settlement discussions.

[39] On that basis, the costs assessor concluded that "a reasonable fee requires some reduction from the total (adjusted) amount invoiced to address the deficiencies relating to the service of the setting aside application" but not by reason of any issue relating to the application for recall or the application for leave to appeal out of time.

[40] The costs assessor's overall conclusion and recommendation were expressed as follows:

> Considering the deficiencies in Mr ID's handling of the matter and steps involved in the litigation in the round on balance I recommend that a fair and reasonable fee for the services requires a reduction of his fees by the (GST exclusive) amount of the adjusted fourth invoice ($10,290).
>
> While this invoice represents work for matters other than the application to set aside the bankruptcy notice, it related to the period of work where the setting aside was a prime focus and where the fate of that application would have had an influence on all other aspects of Mr ID's work, including the settlement discussions more generally. Therefore, on balance I consider it appropriate for any reduction to be for the whole [of] this invoice.

The Standards Committee decision

[41] The Committee considered the costs assessor's report and otherwise undertook its reconsideration of the fees issue at its March 2020 meeting. The question it asked itself was:

> Did ID charge [the complainants] more than a fee that is fair and reasonable for the services provided, having regard to the interests of both the lawyer and clients having regard also to the factors set out in rule 9.1 of the [Rules].

[42] The Committee approved the assessor's focus on "… *the services provided and/or the results achieved …"* and noted also that he had rightly taken into account the findings already made by both the Committee and the LCRO that Mr ID's conduct relating to service of the applications to set aside had been unsatisfactory.

[43] The Committee also noted with approval the assessor's comments quoted at paragraph [38] above. It then turned to Mr ID's arguments which were, in summary, that:

(a) It was not appropriate that his fees be reduced by the entire amount of the fourth invoice, as to do so "… amounts to a penalty rather than an assessment of what a reasonable fee should be";

(b) the complainants "got exactly what they asked for", which was "delay so they could reach settlement";

(c) the fact that service was out of time did not affect the outcome of the complainants' applications because the Court considered the merits of the applications in isolation and concluded that they failed on the merits.

[44] The Committee rejected Mr ID's arguments. As to his second argument, it stated that:

> However, it is far from clear that delay, at any cost, was the clients' instruction. Mr KZ certainly did not agree that he and Ms UG got "exactly what they asked for". He said what they "got" was (as stated in the LCRO decision) committing acts of bankruptcy, continuation of the bankruptcy proceedings, less time within which they could achieve settlement, two additional court appearances (and associated time and documentation) and additional legal costs. Similarly, the costs assessor referred to the possibility that "service deficiencies and failure of the application to set aside" may have led to "the complainants' bargaining position being affected and therefore to other legal costs".

[45] As to Mr ID's third argument, the Committee commented that:

> … that argument, made in hindsight after knowing the outcome of the application, misses the point. In making the application, [the complainants] would have been expecting, and been willing to pay for, a chance at succeeding in the application (not knowing how the Court would decide the merits). Mr ID's failure to meet the technical requirements of the application meant they effectively had to pay for certain failure.

[46] The Committee did not expressly comment on Mr ID's first argument that the reversal of the entire invoice "amounts to a penalty rather than an assessment of what a reasonable fee should be".

[47] The Committee proceeded to record its agreement with the contents and conclusions of the costs assessor's report and resolved to adopt it. It determined that Mr ID's charging of fees that were not fair and reasonable, in breach of r 9, constituted unsatisfactory conduct and ordered Mr ID:

(a) to cancel his legal fees set out in an adjusted invoice of 12 March 2014 in the sum of $10,290 + GST;

(b) to refund all sums already paid by the respondents in respect of that invoice, excluding sums for disbursements;

(c) to pay costs of $1,000 to the NZLS.

[48] In doing so, it noted that the end result in financial terms was not as favourable to the complainants as the Committee's original, December 2014, determination but that

it was required to have regard to the direction given to it by the LCRO in the first LCRO decision.

Application for review

[49] In his application for review dated, Mr ID states simply:

> The committee was wrong in its decision that the fee charged by me was unreasonable and unfair. The Committee was wrong in finding that the results achieved were grounds for the fee to be reduced.

[50] In challenging the basis of the decision, he challenges the unsatisfactory conduct finding and the consequent orders.

[51] Mr ID's application was not supported by any fresh submissions. I infer that he maintains each of the three principal arguments summarised at paragraph [43] above and particularly the second argument.

[52] The complainants were invited to comment on Mr ID's review application. Mr KZ did so by letter in July 2021 in which he stated, among other things:

> One of the most frustrating and damaging aspects of this whole action is that Mr ID simply either did not know of the relevant law, misunderstood the legal process required, and/or simply failed in his obligation to research or correctly interpret the law related to the different aspects. This happened not once, but many times. While in addition to this, we received poor advice on the next steps and relevant risks, [it is] the fundamental aspect of not knowing the law and or not researching the correct process and relevant steps which is the most frustrating. The combination of a poor knowledge and interpretations of the relevant law, combined with several elements of poor advice resulted in a devastating result both financially and mentally.

[53] Mr KZ listed the first three of a number of "key issues" as follows:

> – A[n] incorrect interpretation of the law based on the original judgement, which resulted in us attempting to get a "recall of judgement" correction, rather than an appeal
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> – Once the motion was dismissed, we were still entitled to apply for an out of time appeal which Mr ID did not research and failed to advise us on
>
> – Most damaging of all, the simple matter of not knowing the implications of failing to get an on-time statement of defence lodged in response to bankruptcy proceedings being brought against us (made more unexplainable and irresponsible by the judge implying that this had happened before with Mr ID, and he should well know the implications). There was an additional two court appearances and a further $13,000 in fees charged as an extra result of this as well is the acts of bankruptcy recorded against UG and myself.

Review on the papers

[54] This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows an LCRO to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties. The parties have agreed to that course of action.

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

Nature and scope of review

[56] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[5]

> … 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.
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> 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.

[57] More recently, the High Court has described a review by this Office in the following way:[6]

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

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

[58] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee's determination, has been to:

(a) consider all of the available material afresh, including the Committee's two decisions, the first LCRO decision and the costs assessor's report; and

(b) provide an independent opinion based on those materials.

[59] To be clear, my independent opinion relates only to the fairness and reasonableness of Mr ID's fees, the consequent unsatisfactory conduct finding and the orders made by the Committee in the fees decision. The first LCRO decision was final in relation to all other matters.

The issues

[60] The sole issue for consideration in this review is whether or not the fees charged by Mr ID were fair and reasonable having regard to the interests of both the complainants and Mr ID. Answering this generally stated question requires consideration of the following elements:

(a) What is the context in which the assessment of fees must be carried out?

(b) Was the costs assessor's assessment process robust?

(c) Was the Committee's process on reconsideration robust?

(d) What is my independent view of the application of the reasonable fee factors?

(e) Is there a persuasive basis for arriving at a conclusion that is different from that of the Committee?

(f) Is there a more appropriate outcome than cancellation of the fourth invoice?

[61] In considering those elements and despite the finality of the first LCRO decision in relation to all matters other than the fees aspect, it is nevertheless necessary to have regard to all the steps taken in the legal advisory process during Mr ID's retainer. I do some with considerable reservation because the process carries the risk of the reopening of old sores for the parties.

Discussion

(a) What is the context in which the assessment of fees must be carried out?

[62] The starting point is that Mr ID had no responsibility for the legal predicament the complainants were in at the time his retainer commenced. The background circumstances can be summarised as follows:

(a) the complainants were two of three trustees of the [R Family Trust];

(b) in their trustee capacity, they entered into an agreement to purchase a residential property;

(c) they purported to cancel the purchase agreement;

(d) the vendors resold the property;

(e) the vendors then sued the complainants for a claimed overall loss suffered on resale and sought summary judgment against them;

(f) the purchase agreement contained a clause limiting the personal liability of any trustee who did not have an interest in the assets of the trust in the following terms:

> if [the trustee] has no right to or interest in any assets of the trust except in that person's capacity as a trustee of the trust, that person's liability under this agreement will not be personal and unlimited but will be limited to the actual amount recoverable from the assets of the trust from time to time ("the limited amount");

(g) according to the complainants, the trust had no assets;

(h) according to the complainants, they had no interest in the assets of the trust, if it had had assets, except in their capacity as trustees;

(i) the complainants' solicitors at the time failed to plead the limitation of liability clause in opposing the summary judgment application;

(j) summary judgment was entered against the complainants for about $261,000;[7]

(k) the judgment was sealed;

(l) the complainants did not appeal the summary judgment;

[7] *BY v UG* [2013] NZHC XXXX.

(m) the complainants changed their solicitors and their new solicitors, [law firm A], instructed Mr ID.

[63] It is clear that the complainants had already been fixed with liability at the point Mr ID was instructed. Their focus at the time appears to have been on financial management of the process of meeting their liability. The complainants did not have the cash resources to meet the judgment. There was negotiation with the vendors over terms and timing of payment.

[64] Mr ID says it was him who drew attention to the trustee limitation of liability clause in the purchase agreement. The email correspondence at the time appears to confirm that it was Mr KZ who drew the clause to Mr ID's attention. In any event, this raised the issue of the negligence of the complainants' previous solicitors, [law firm B]. Negotiations were opened with them and their insurer.

[65] From this point, things went from bad to worse for the complainants. They applied for recall of the High Court summary judgment. Mr KZ says this was done on Mr ID's advice although there is a suggestion that the original recommendation may have been from [law firm B]. The application was unsuccessful.

[66] The complainants then concluded an agreement with the judgment creditors over terms for payment of the judgment sum. Unfortunately, Mr KZ was unable to complete a proposed sale of company shares to raise the necessary funds and the complainants defaulted in the performance of their agreement to pay the judgment sum.

[67] The judgment creditors then issued bankruptcy notices. The complainants wished to apply to have those notices set aside but not on any of the statutory bases available under the Insolvency Act. Rather, they sought to invoke the inherent jurisdiction of the Court to prevent an alleged abuse of process on the basis that judgment should not have been entered against them.

[68] The applications to set aside were arguably adversely affected by the procedural error discussed at paragraphs [20] to [26] above.

[69] The complainants then also sought leave from the Court of Appeal to appeal to that Court out of time against the summary judgment decision. This application was also unsuccessful. Mr ID's retainer has been terminated before the application was heard.

[70] I will discuss some of the implications of this unhappy course of events later, in my discussion of the "results achieved" for the purposes of fees assessment.

(b) Was the costs assessor's assessment process robust?

[71] There is nothing before me, by way of either evidence or submissions, to suggest that the costs assessor did not give proper and careful consideration to the applicable reasonable fee factors set out in r 9.1 of the Rules.

[72] The costs assessor has appropriately referred to the conduct findings made in the first Committee determination and to the findings either affirmed or not in the first LCRO decision.

[73] The costs assessor is a senior practitioner who was undoubtedly familiar with the difficulties that can arise from the vagaries of client instructions and the need to adapt litigation tactics to unpredictable developments in the commercial circumstances and to the similarly uncertain outcomes of legal proceedings, of which there were several in this instance.

[74] I am particularly mindful of the costs assessor's comments set out at paragraph [38] above and the need to ensure that I am not unduly influenced by an unhurried, entirely retrospective analysis of events that were unfolding and requiring response in real time.

[75] Accordingly, although I may come to a different conclusion from that of the costs assessor, particularly in relation to the perceived significance of the untimely service of the applications to set aside the bankruptcy notices, and will express differing views on the proper application of some of the reasonable fee factors, I consider the costs assessor's process to have been sound and his analysis thorough.

(c) Was the Committee's process on reconsideration robust?

[76] It is the role of the Committee to itself consider the evidence before it and to reach a view on the conduct issues requiring consideration; in this instance, fees. It is not appropriate for a standards committee to delegate the task of reaching a final determination.

[77] In this instance, the Committee approved the costs assessor's assessment and adopted his overall conclusion and recommendation set out at paragraph [40] above. It is clear from the text of the fees decision, however, that in doing so the Committee did not simply rubber stamp the costs assessor's views.

[78] The Committee commented on various key findings in the costs assessor's report. It then gave consideration to Mr ID's submissions and expressed its view about

their cogency. I am satisfied that in reaching and expressing the views set out in paragraphs [44]–[45] above, the Committee demonstrated its own considered thought process in ultimately resolving to adopt the costs assessor's conclusions and recommendation.

[79] This is not to say that I necessarily agree with either the costs assessor or the Committee in their assessment of the factors most pertinent to a determination of the reasonableness of Mr ID's fees. I do specifically agree, however, with the Committee's comment that "it is far from clear that delay, at any cost, was the clients' instruction".

(d) What is my independent view of the application of the reasonable fee factors?

General observations

[80] The starting point here is that, in the absence of any obvious error, the views of the costs assessor and of the Committee should not be lightly dismissed.[8] Here, the costs assessor was a very experienced practitioner with specialist expertise in civil litigation.

[81] The benefit of a committee assessment is that the Committee comprises lawyers (normally five) with a range of practice perspectives and lay members (a minimum of two) to provide a client-focused, consumer perspective that is not influenced by legal technicalities. The Committee debate has the benefit of isolating outlying views and generally arriving at a considered consensus.

[82] An observation I make about both the Committee's and the costs assessor's assessment processes relates to the somewhat formulaic approach to the calculation of fees based on time spent at an hourly time recording rate. Although I do not have Mr ID's terms of engagement before me, if there were any,[9] I presume this was the basis on which he advised that his fees would be calculated.

[83] It is implicit in Mr ID's provision of the hours engaged on the work billed on each invoice, as set out at paragraph [30] above, that he considers a fee determined solely by time spent at a specified hourly rate to be justified by default i.e. to be fair and reasonable by agreed definition unless there is good reason to depart from it.

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[8] *DL v EX* LCRO 128/2012 at [23].

[9] He was instructed by [law firm A]. A barrister is not required to provide terms of engagement to an instructing solicitor. Mr KZ refers only to an oral discussion during which Mr ID quoted an hourly rate of $350.

[84] This seems to be the basis of his submission that the Committee's fees assessment constitutes a "penalty", which is otherwise unexplained. If so, I do not accept the submission.

[85] To put it simply, this is not the regulatory construct. The effect of rr 9 to 9.2 of the Rules is to enshrine the concept of value billing whether lawyers like it or not. It is trite that time spent at an hourly rate may inform the process of setting a reasonable fee but it is no substitute for a proper consideration of overall value delivered by the lawyer in the context of the risks assumed by the lawyer.

[86] "Time engaged and labour expended" is itself a reasonable fee factor and the recording of it at an hourly rate or rates is invariably a very useful and often necessary starting point. This operates as a proxy or partial proxy for five of the other 12 reasonable fee factors set out in r 9.1. These are, by reference to the paragraph numbers in r 9.1:

> (b) the skill, specialised knowledge, and responsibility required to perform the services properly;
>
> (e) the degree of risk assumed by the lawyer in undertaking the services;
>
> (g) the experience, reputation, and ability of the lawyer;
>
> (l) the reasonable costs of running a practice;
>
> (m) the fee customarily charged in the market and locality for similar legal services.

[87] The other six reasonable fee factors set out in r 9.1 have no inherent association with the lawyer's hourly rate.

[88] The specified reasonable fee factors set out in r 9.1 are themselves inclusive, not exhaustive. This means that if there are additional factors that are relevant in the circumstances, they can also be taken into account. One must step back and look at all the circumstances in considering the fairness and reasonableness, to both parties, of the fees charged. This is often described as looking at the fees charged "in the round".

[89] With those thoughts in mind, my comments below mainly record aspects of the matter that were probably taken into account as part of the costs assessment and Committee discussion process without necessarily being expressly recorded in either the costs assessor's report or the fees decision.

Time and labour expended

[90] I accept the costs assessor's view, affirmed by the Committee, that the time and labour expended by Mr ID for the steps he undertook were appropriate and reasonable.

Whether all of the steps undertaken were appropriate and reasonable is not so straightforward an issue, as discussed later.

Skill and specialised knowledge

[91] I accept the costs assessor's assessment, affirmed by the Committee, that Mr ID had the necessary skill and specialised knowledge to handle the matters he was engaged to undertake.

[92] In accepting those findings, I interpret "skill and specialised knowledge" as having a focus on technical expertise in the conduct of civil and insolvency litigation as distinct from the exercise of sound professional judgement in an advisory capacity.

The importance of the matter to the client

[93] I confess to some surprise at the costs assessor's characterisation of the matter as being "of some importance to the complainants". It seems to me that the proper identification of appropriate steps to attempt to extricate themselves from the commercial and legal predicament they were in, and the competent undertaking of those steps, might well have been regarded by the complainants as being in the "mission critical" category.

[94] The relevance of this is largely hypothetical in the context of the current fees assessment. If, despite the manifest legal obstacles, Mr ID had been able to achieve an outcome favourable to the complainants on either the recall application or the application for leave to appeal, a fair and reasonable fee might well have been higher than the amount Mr ID actually charged.

[95] Favourable outcomes were objectively unlikely and, as matters transpired, were not achieved. This raises an issue of the value of advice, as distinct from the value of process, to which I will return.

[96] In making that observation, there is necessarily a relationship between the importance of the matter to the client and the results achieved. I will discuss the latter aspect last.

Urgency and circumstances in which the matter is undertaken and any time limitations imposed including those imposed by the client

[97] I adopt the costs assessor's comments on this aspect, which were:

> While there were certain points in the litigation where some urgency was required I do not consider that the urgency and circumstances had or should have had any

> great impact on the fees. In my view where matters had some urgency these were limited and could have been anticipated as usual 'pinch-points' in litigation of this kind.

[98] I make two other observations about "urgency". The first is that service of the applications to set aside the bankruptcy notice was obviously urgent, on both occasions. This was so regardless of Mr ID's apparently mistaken view that service did not need to be effected within the 10 working day time limit.

[99] The evidence from Mr KZ was that service could have been effected in time (in the case of his application) and he was available to drive to the vendors' lawyers' office to serve the documents by 5 pm on the last day if he had known that the time limit was critical. He says that Mr ID told him it was not.

[100] The matter is not directly relevant to the fees assessment because Mr ID was not charging on a time basis for something he did not do.

[101] My second observation about urgency does not relate to any legal process but to the need for the complainants to receive considered advice on the imprudence of both entering into the unconditional settlement agreement with the vendors and compromising their negligence claim against [law firm B] as soon as their intention to do so was communicated.

[102] Again, this is not directly relevant to the "urgency" aspect of the fees assessment because, again, Mr ID was not charging for something he did not (on the information available to me) do. It is nevertheless relevant to an overall assessment of the value of the services provided.

<u>The degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved</u>

[103] I am not sure that the costs assessor's and Committee's assessment of this factor was entirely correct. The relevant comment is as follows:

> There was a reasonable level of risk in the transactions undertaken by Mr ID for the reasons stated above and in terms of the complexity of the matter. Given the complainants' financial situation when faced with the judgment debt there were clearly significant potential adverse consequences faced by them. These extended to potential bankruptcy and/or the sale of significant business assets to meet this judgment as well as further exposure to costs awards where litigation was unsuccessful. The risk was compounded by the potential for actionable claims against the complainants' previous lawyers, and the potential to compromise those claims through missteps in the subsequent litigation handled by Mr ID.

[104] Rule 9.1(e) is about the risk assumed by the lawyer in undertaking the services, not the commercial and legal risks faced by the client. Here, the complainants were at huge legal risk and under considerable financial pressure, including the threat of bankruptcy. In those circumstances, the primary risk to the lawyer is of not being paid for his services.

[105] In addition, there was the risk of a client already faced with a compromised legal position and highly uncertain legal process outcomes seeking to blame the lawyer once that compromised position and those outcomes were crystalised. It is not unfair to the complainants to observe that there is an element of that in their complaint.

[106] In such circumstances, the risk to the lawyer is one of fielding a professional conduct complaint, as is this case here, and/or a professional negligence claim (in addition to the risk of non-payment).

[107] In simple terms, the assumption of higher risk by the lawyer can warrant the charging of higher legal fees. There is no suggestion that Mr ID sought to do so in this instance. On the contrary, he charged purely on time spent at a rate he suggests was on the modest side of reasonable at the time. In my view, it was open to him to incorporate a risk element in his assessment of a reasonable fee.

[108] The value of the "property" involved here was, by analogy, the amount of the judgment that had been entered against the complainants. The only relevant fact about the sum involved was that it was more than they could afford to pay, hence the legal steps taken to avoid or delay paying it. The matter is not relevant to the fees assessment.

<u>The complexity of the matter and the difficulty or novelty of the questions involved</u>

[109] The costs assessor made the comment about complexity quoted at paragraph [32(e)] above, which I agree with and consider to be highly pertinent.

[110] He did not comment on the difficulty or novelty of the questions involved. It seems to me that there was certainly a substantial degree of difficulty in the complainants' legal position that Mr ID did his level best to try to overcome.

[111] Both the recall application and the applications to set aside the bankruptcy notices faced inherent difficulties on both the facts and the law. In terms of a fees assessment, there can be additional value in being able to "pull a rabbit out of a hat". Mr ID was not able to do so, so no question of additional value arises.

[112] This does not mean that the work involved in pursuing the applications warrants a lesser fee, depending on what advice was or was not given about pursuing the applications in the first place.

The experience, reputation and ability of the lawyer

[113] I have no reason to question the cost assessor's finding, affirmed by the Committee, that:

> Mr ID is an experienced barrister who has expertise in the areas relevant to this litigation. In my view, his experience and expertise means that his rate at $350 per hour (as later advised by him and discussed above) was appropriate.

The possibility that the acceptance of the particular retainer would preclude engagement of the lawyer by other clients

[114] Neither the assessor nor the Committee mentioned this fee factor. There is no suggestion in the materials that it might have been relevant.

Whether the fee is fixed or conditional (whether in litigation or otherwise)

[115] As the costs assessor observed, Mr ID's fees were neither fixed nor conditional.

Any quote or estimate of fees given by the lawyer

[116] This fee factor is not mentioned in the costs assessment, presumably because it was not applicable. I confirm that there is no suggestion in the materials of any quote or estimate having been given by Mr ID.

Any fee agreement (including a conditional fee agreement) entered into between the lawyer and client

[117] Again, this is also not mentioned in the costs assessment, for the same reason; there is no suggestion of any fee agreement.

The reasonable costs of running a practice

[118] The reasonable costs of running a practice include the costs of maintaining premises, negligence insurance, research resources, secretarial support, continuing education and the like. They constitute one of the factors taken into account by any lawyer who charges primarily on the basis of time spent when deciding on an hourly time recording rate.

[119] Although I am not sure that Mr ID's level of experience in the type of work undertaken by him is directly relevant to this fee factor, as suggested by the costs assessor, I adopt his implicit assessment that Mr ID's adjusted hourly rate of $350 appropriately incorporated the reasonable costs of running a practice.

The fee customarily charged in the market and locality for similar legal services

[120] I agree with the costs assessor's comment that: "if the services had been undertaken to an appropriate standard then they would have been considered to be within the market range for these services" at the time (bearing in mind these events occurred almost 10 years ago).

The results achieved

[121] Although the service error relating to the applications to set aside was the original focus of the complaint, other aspects of the advisory process and outcomes are relevant to assessment of the fairness and reasonableness of Mr ID's fees. These were:

(a) The making of the application for recall of the summary judgment decision;

(b) the delay in applying to the Court of Appeal for leave to appeal out of time;

(c) the effect on the complainants' appeal prospects of the settlement agreement they reached with the vendors regarding satisfaction of the summary judgment;

(d) the settlement reached with the complainants' previous solicitors about their negligence; and

(e) the basis on which the application to set aside the bankruptcy notices was made.

[122] The first relevant process is the application for recall. Mr ID's reporting letter of 25 October 2013 records that the basis of the application was "that there is uncertainty over whether the trustees of the R Trust are personally liable or only are liable as trustees to the extent of the trust assets". If that was the case, I struggle to understand how the recall application could have had a real chance of success.

[123] There was no such arguable uncertainty on the face of the sealed judgment. The complainants as trustees were ordered to pay the judgment sum. It is a given that trustees are personally liable for obligations incurred as trustees absent any applicable

contractual or statutory relief from such liability. The defence based on the limitation of liability clause had not been raised.

[124] It is clear from Mr KZ's correspondence that he had formed a view to the contrary. On 14 October 2013 at 9:33 am, he wrote:

> … from my viewpoint the most important thing is to establish if there is any personal liability, then minimise the involvement of the other trustees if we can, then to finalise some kind of deal with the plaintiff, if that's the easiest.

[125] Later that day, at 3:13 pm, he emailed Mr ID again:

> … if I read it now, I still don't see how he has even implied personal lability. All I think we need is clarification and confirmation of the interpretation that the judgment as written excludes any personal liability. Obviously we still are likely to need to supply the trust's deed as a part of whatever filing we make, but that together with the clause 18, should make it very easy for the Court. I'd much rather we get an instruction now, than to have to argue that at the examination.

[126] I am more than puzzled that Mr ID did not seek to correct Mr KZ's misunderstanding of the effect of the summary judgment. It was plainly wrong. All he wrote in reply was:

> Whichever way we go we still have to make an application to the Court – and clarifying a judgment is normally done by recalling it or correcting it. That is the quickest way.

[127] There was no "slip" or other manifest error or omission in the judgment. It could not have been argued that the failure of the complainants' solicitors to plead an affirmative defence that was available to them and to adduce affidavit evidence as to the applicability of the limitation of liability clause could constitute an error by the Court.

[128] Even if that could have been argued, the judgment had already been sealed. It was final, subject only to appeal rights. The finality of judgments is a cardinal principle of the justice system.

[129] It must be acknowledged that there is always the possibility, in any litigation, of persuading a sympathetic judge to "bend the rules" in one's client's favour. In this instance, this would have involved persuading the Court that the summary judgment did not mean what it said.

[130] A complicating factor here, which was probably unexpected, was that the Judge hearing the recall application was not the Judge who made the summary judgment decision. This probably made recall even more unlikely.

[131] When commenting in the fees decision on the later application to set aside the bankruptcy notices, the Committee made a comment about the complainants having "to

pay for certain failure". Although conscious of the clarity always afforded by hindsight, I consider the same comment could equally have been made with some confidence about the application for recall.

[132] Overall, I consider the costs assessor's comments, quoted in the third paragraph at paragraph [38] above, which were adopted by the Committee, to have been generous to Mr ID.

[133] The next matter was the application to the Court of Appeal for leave to appeal out of time. It is axiomatic that such an application must be brought as soon as is reasonably practicable with good reasons provided for the failure to appeal within the statutory timeframe and for any delay in then applying for leave.

[134] It seems to me extraordinary that the application for leave to appeal out of time was left as long as it was, if there were arguable grounds to advance it at all. At the least, given that there did not appear to be any strong ground for recall, it would have been prudent to pursue such an application in parallel with the application for recall.

[135] I agree with the Committee's assessment of this aspect in the first Committee decision, which was that:

> An immediate appeal against the [summary judgment decision] should have been launched, or if not able to be done in time, then an immediate action for an out of time appeal begun.
>
> [law firm B] should have been put on notice related to their liability for negligence in the matter, and had them actively involved in the appeal.

[136] In this regard, I note there was a factual dispute between the complainants and Mr ID. Mr KZ stated that:

> While our original approach to Mr JK, and our first few calls to Mr ID [were] within the Appeals timeframe, our first formal meeting with Mr ID was outside the appeals process as initially he did not believe … that an appeal could be launched due to arguments not being argued correctly is not a ground for an appeal.

[137] Mr ID's view of the matter was recorded as follows:

> The appeal period … started on 27th August 2013. I was not instructed until early October 2013 which was outside the period for an appeal to be brought as of right.

[138] On this point, the Committee found in favour of Mr ID. At paragraph [35] of its first decision, it stated:

> It is also notable that Mr ID had not been instructed until after the period for appeal as of right had expired. It was nothing to do with Mr ID that an appeal had not been filed within time.[10]

[139] The Committee also considered it a moot point whether the filing of an appeal (if within time) or an application for leave to appeal out of time would have been of any benefit to the complainants. The Committee commented:[11]

> Further, any application for leave to appeal out of time was always going to face difficulties quite aside from the delay and the impact of any settlement negotiations. As Associate Judge D set out, Mr KZ and Ms UG would also have to have persuaded the Court of Appeal that they could introduce a new ground of defence, that they could do so on the basis of fresh evidence and that there was merit in their appeal.

[140] The key obstacle the complainants would have faced in the pursuit of that argument was the need for "fresh evidence". On the assumption that the purchase agreement must have been before the Court, the trustee limitation of liability clause was not fresh evidence. Rather, it was evidence the significance of which had been overlooked by the complainants' then counsel in the High Court summary judgment process.

[141] I think it likely that Mr ID's initial negative assessment of the appeal prospects, as recorded by Mr KZ, was probably well founded on the basis of the information known to him at the time. In any event, the Committee concluded that Mr ID's conduct in relation to that aspect did not warrant disciplinary action and that finding was not disturbed on review in the first LCRO decision.

[142] The next potentially relevant aspect is the complainants' entry into an unconditional settlement agreement with the judgment creditors over arrangements for payment of the judgment debt. I do not have the benefit of a copy of the settlement agreement. From subsequent references to it, however, it seems that it was an unconditional agreement to pay by an agreed process within a specified timeframe.

[143] Mr ID's initial explanation to the Standards Committee[12] was that:

> By November Mr KZ had instructed me that he wanted to settle the judgment sum and that all he needed was time. His instructions to me were to delay matters as long as possible so as he could arrange the necessary funds …. Settlement was negotiated with the Estate with settlement to occur before Christmas… The Trust defaulted in settling with the [VW Estate] as agreed…

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[10] The first email from Mr ID to Mr KZ in the material before me was a week after expiry of the appeal period.
[11] At [35] of the first Committee decision.
[12] Letter from Mr ID to Standards Committee (14 August 2014) at [8]–[9].

[144] It is not entirely clear from the materials available to me to what extent Mr ID was involved in the settlement negotiations with the vendors, although his invoice dated 6 December 2013 refers to "attendances re settling the matter". Mr KZ asserted that:[13]

> Immediately upon losing the judgment recall, Mr ID's advice was for us to settle. It was not as he asserted in item 8, my instructions. … Although I did enter into settlement negotiations, I was very clear that I wanted to keep the options for an appeal open. I was subsequently advised that the entry into these negotiations, particularly when I was not sure that [we] could in fact settle, was again extremely prejudicial to the out of time appeal. I was advised incorrectly by Mr ID that this would not [affect] my appeal.

[145] Mr ID noted at an early juncture:[14]

> 4. Following the judgment of Associate Judge [judge D] on the recall application on 8th November 2013 Mr KZ commenced negotiating settlement in my absence with the plaintiffs. He did so through my instructing solicitor JK and also contacted the plaintiffs directly through their counsel Mr NH. Attached and marked "B" are emails which evidence this. The offer made through my instructing solicitor was declined.
>
> 5. When I returned from overseas in mid-November Mr KZ emailed me and instructed me to forward a further offer which I did (see "C"). He also advised that he had contacted [law firm B] directly in my absence…
>
> 7. On 27th November 2013 Mr KZ instructed me to accept settlement with the plaintiffs with settlement to occur on 20th December 2013 (see email "E"). I arranged this. Settlement was subsequently negotiated but as per my earlier letter Mr KZ did not settle on 20th December as promised. A further email from Mr KZ marked "F" is self-explanatory.

[146] The emails provided by Mr ID support the above summary of his involvement. Mr KZ was not only directly the decision-maker in respect of settlement with the vendors, he was also giving clear and written instructions to his solicitors and counsel and even writing the correspondence in draft for them to send.

[147] It seems equally clear from Mr KZ's correspondence, however,[15] that Mr KZ was under the impression that he might be able to negotiate a settlement with the vendors on the basis he proposed while at the same time preserving the possibility of seeking leave for an appeal out of time. After giving his instructions about the settlement offer to the vendors and the opening of discussions with [law firm B], Mr KZ wrote:

> Finally I would like you to evaluate the chances of getting a "out of time" appeal and "stay of proceedings" successfully through. Potentially this possible action should be funded by [law firm B]? … Lets talk later today once you have evaluated this note, but if you could get the letter away this morning to forestall personal action I would appreciate it.

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[13] Email KZ to NZLS (8 September 2014) at [3].
[14] Letter ID to NZLS (26 September 2014) at [4]–[5].
[15] Email KZ to ID (18 November 2013 at 8:42 am).

[148] There is no evidence before me of any advice given by Mr ID in response to that request. Specifically, there is no evidence of Mr ID attempting to draw to Mr KZ's attention that he was "trying to have his cake and eat it too" by negotiating a payment arrangement to honour the judgment debt and at the same time seeking to preserve the ability to dispute liability at a later date.

[149] In such circumstances, it is incumbent on counsel to give clear, corrective or cautionary advice. To the extent Mr KZ was running his own commercial and litigation strategy, which he clearly was, it was a poor one.

[150] Again, it is not open to me to revisit any competence or diligence finding about Mr ID in this respect. By reason of the correspondence quoted above, however, I do not think the Committee's conclusion[16] that "it was only when [the complainants] were unable to source funds and the settlement fell through (which was through no fault of Mr ID) that the issue of attempting to appeal the judgment arose again" was well-founded.

[151] Although any assessment of the prospects of success on an appeal would be speculative, the Committee correctly noted that even the preliminary step of an application for leave to appeal out of time "was always going to face difficulties" for the reasons set out in the extract quoted at paragraph [139] above. The Committee's conclusion was that Mr ID's conduct in relation to the settlement negotiations did not warrant disciplinary action.

[152] My colleague did not identify the matter as an issue to be addressed in the first LCRO decision, as the focus was on the later matter of the application to set aside the bankruptcy notices. Nevertheless, although directing reconsideration of Mr ID's fees as a whole in the context of the complainants' expanded complaint, my colleague did not direct any reconsideration of the Committee's conclusion that Mr ID's conduct did not require disciplinary sanction.

[153] The Committee made reference to this fact at paragraph [37] of the fees decision in stating that:

> The Committee had determined to take no further action on the remaining concerns raised by the complainants (as to, for example, the application for leave to appeal out of time), and the LCRO had not disturbed that determination.

[154] The Committee went on to observe that the costs assessor's overall view was as stated at paragraph [38] above, namely that "…the outcome achieved cannot be considered to be satisfactory in relation to the inadequacies in respect of service only",

[16] First Committee determination at [34].

the reference to "service only" being to the failure to serve the applications to set aside on time.

[155] The Committee noted and approved the costs assessor's finding that the fees charged "were unreasonable for the results achieved".[17] The better view about the application for leave to appeal out of time following the complainants' entry into the settlement agreement with the vendors is that any unreasonableness of the fee charged relates to "the services provided" rather than "the results achieved".

[156] The result achieved, or not achieved, was that the application for leave to appeal out of time was declined. It seems to me that an ultimate appeal on the merits was always going to be unsuccessful because the complainants had unconditionally agreed to pay the judgment sum. This made it very unlikely that leave to appeal would be granted.

[157] Therefore, in my view, the primary deficiency in the services Mr ID provided was in failing to evaluate, and give clear advice to the complainants about, the inherent conflict in their litigation strategy and consequently the undesirability of expending resources on an application for leave to appeal out of time (regardless of the timeliness aspect) once they had concluded a payment agreement with the vendors.

[158] I do not consider it to be a sufficient answer for Mr ID to argue, in effect, that he followed the clear instructions of Mr KZ (which is correct) when it should have been apparent that those instructions were ill-conceived and required wise counsel. Such counsel had in fact been requested.

[159] I emphasise that it is not open to me to make a finding of breach of r 3 in this respect but I can take into account the views I have expressed in forming a view as to the overall fairness and reasonableness of Mr ID's fees.

[160] I make the same general observation about the next aspect of the services provided by Mr ID, namely his services relating to the settlement the complainants reached with their previous solicitors, [law firm B], regarding the potential negligence claim against that firm.

[161] There are two objectively surprising things about that settlement. These are:

(a) that settlement was reached before all the implications of the firm's negligence were known and particularly before the quantum of the complainants' resulting loss had been established; and

[17] Committee's fees decision at [38].

(b) the sum the complainants agreed to accept in settlement was very modest in comparison with the amount for which they had been held liable to the vendors in the summary judgment proceedings.

[162] In both respects, the complainants seem to have got the cart very much before the horse. In expressing that view, I am conscious that I do not have visibility of all the factors that might have been at play in the complainants' decision. In particular, the following comment made by Mr ID in a letter to the NZLS on 1 December 2014 may be highly pertinent:

> … Mr JK (my instructing solicitor) and I advised Mr KZ not to settle with [law firm B] as it would have an effect on the appeal to the Court of Appeal. Mr KZ did not accept our advice. He simply wanted money and he wanted it quickly. I attach an email from Mr JK in support of the above.

[163] The email from Mr JK was to Mr ID on 6 October 2014 in which he commented:

> … I can certainly say that I did not urge him to settle with [law firm B] and I have not seen anything that suggests that you did either. My view on that was that a settlement with them alone removed any possibility of being able to pass liability for a larger amount on to them and this was a concern given the size of the judgment against him. My recollection was that he was keen to get some money from them to establish a fighting fund for the appeal etc and that he saw a real benefit in having some money in hand at an early stage.

[164] In the same email, Mr JK also commented that:

> My file does not have a lot of content around the matter of settlement with [law firm B] as you attended [the] meeting with him and I was advised after the event that a settlement had been agreed.

[165] The fact remains that the complainants had had summary judgment entered against them for $261,000 in circumstances where, but for the firm's failure to plead the affirmative limitation of liability defence and support it with evidence, it was strongly arguable that they had no liability at all. Regardless of what view a court might ultimately have come to on that issue at full hearing, the complainants had a high probability of getting through the summary judgment process unscathed but for [law firm B]'s negligence.

[166] At the time the settlement was reached, the recall application had been successful and no application for leave to appeal out of time, let alone an appeal itself, had been filed. In those circumstances, the immediate downside to settling a potential claim at the agreed figure was obvious; abandoning a claim for at least $185,000. In contrast, the possible upside was opaque.

[167] That was a decision for the complainants, not their lawyer, to make. What concerns me, in the context of a fees assessment, is the nature and extent of any advice given or not given by Mr ID regarding the matter.

[168] Mr KZ's own thinking about the matter is set out clearly in his email to Mr ID and Mr JK on 7 February 2014 in which he stated:

> I think no matter which option we end up with, we should be back talking to the insurance company today.
>
> If they think we can win at appeal, they will not want to offer more than the legal fees that it would cost.
>
> My estimate of that is $23 with [law firm B], $16k with yourself (including Court fees) plus at least three more appearances with the out of time appeal, the appeal, the means test etc etc. Say $25. Plus at least say $10 to $15 for [law firm B]'s time to support it, and the insurance company's time which I'm sure they would rather not spend.
>
> This adds up to say $80k in fees. I think we go back to them this morning (assuming that they have forwarded to you all the relevant research that you asked for?) and ask for $85. This is simply the cost of fees, and they avoid the risk of a finding against us and ancillary costs.
>
> The next issue is to relook at the out of time appeal and the likelihood of getting it. Which probably means having the submission drawn up, ideally by the end of today for us to evaluate.
>
> If its 50:50 we should go back to negotiate with the plaintiff.
>
> If its 70% chance of succeeding we can either negotiate harder or go ahead with the appeal.

[169] The basis for Mr KZ's opinion of damages theory in negligence at the time is not evident from the materials. I do not know whether this was entirely his own idea, or whether either Mr ID or Mr JK had contributed to it, or whether either [law firm B] or their insurers had stated a position on the matter that influenced Mr KZ.

[170] The previous November, when first raising with Mr ID the issue of opening discussions with [law firm B] about their potential liability, Mr KZ had commented that:

> … EF … will be fully aware of the fundamental mistake he made, and the potential liability that has arisen. My second option is to get [law firm B] to lend the trust $261k to settle the matter (plus refund me the $22k I spent with them) which I would repay in June of next year. As discussed the key issue for me would be one of timing, and a loan of this nature would mean I could keep all my shares, and settlement mid next year would not be an issue. If they will not help in this matter we should file against them as soon as possible if we believe that we have a strong case.

[171] On 19 December 2013, Mr KZ had commented:

> JK was of the opinion that we would not be looking to appeal, from my understanding of our conversation our thinking is that we would have to in order to be successful against [law firm B]?

[172] In another email on 24 January 2014, Mr KZ further stated:

> … in relation to the question of an appeal, we did not appeal immediately after the hearing as we had been advised by [[law firm B]] that the trustees were not personally liable and the trust had no assets.

[173] On 12 February 2014, on the same day as he emailed Mr ID about a proposed "final offer" to the vendors, Mr KZ stated:

> I suggest we finalise settlement with insurance company, file appeal and get on with it – what other choices are there?

[174] Two things are evident from these communications. The first is that Mr KZ was operating in what can best be described as a "state of flux" characterised by considerable commercial and procedural confusion. The second is that he was overly reliant on his own opinions, which were changing with the changing circumstances.

[175] As the costs assessor rightly pointed out, those circumstances "… involve[d] a number of interrelated facets which, when combined, created the need for careful formulation of a legal strategy", although also noting that "this situation was made more complex by the complainants' inability to readily meet the sealed judgment debt".

[176] I am not in a position to make a finding that there was clearly no "careful formulation of a legal strategy", principally because I have very little information about the advice given by Mr ID to the complainants. Mr ID may have given cogent, strategic advice. If so, it was not recorded in writing or at least not in any written record made available to me. By the same token, there is no evidence that he did.

[177] It is not a lawyer's responsibility to save clients from their own foolhardiness. At least, however, I would have expected to see clear written advice ringing loud alarm bells for the complainants about the potential implications and risks of their own ad hoc decision-making. This applies in relation to each of:

(a) the application for recall of the summary judgment decision;

(b) the delay in applying to the Court of Appeal for leave to appeal out of time;

(c) the effect on the complainants' legal position, and particularly any appeal prospects there might have been, of the unconditional settlement arrangements with the vendors;

(d) both the timing and terms of the settlement the complainants reached with [law firm B].

[178] I note at this point that there is no suggestion in the materials that Mr ID's instructing solicitors had any material role in the advisory process although they had no lesser responsibility to their client.

[179] Mr ID argues, with reference to the bankruptcy matters rather than the above matters, that the complainants got what they asked for, which was delay. When it comes to inquiring into the value of "services provided", one must have regard not only to what the clients ask for but also to what the clients need. In the circumstances that pertained here, what they needed was clear, objective, strategic guidance about how to attempt to make a silk purse, or at least a leather one, out of what was on any analysis a sow's ear.

[180] As at 12 February 2014, the other choice legally and strategically open to the complainants (i.e. ignoring their financial circumstances) was not to settle with [law firm B]'s insurers until the full quantum of their loss was known. On the basis of Mr KZ's comment quoted at paragraph [172] above, the firm had been doubly negligent in both failing to raise the available defence and then in advising the complainants they were not liable to pay the judgment sum.

[181] Again, it is not open to me to make any conduct findings that would be inconsistent with the final decision already made but the views I have expressed above, inform my view of the fees assessment that was the subject of the Committee's fees decision.

[182] I turn now to the matter of the failure in timely service of the applications to set aside the bankruptcy notices and the subsequent work on the hearing of those applications. I have considerable sympathy for Mr ID's position on this aspect, at least in relation to the importance it has assumed in the assessment of the fairness and reasonableness of his fees.

[183] My colleague in the first LCRO decision, the costs assessor and the Committee in the fees decision all concluded that late service of the applications was a clear procedural error and it was noted that Mr ID had been chastised by the Court for making the same error on a previous occasion.

[184] As against that, as Mr ID has repeatedly pointed out, the Court did deal with the applications on their merits rather than simply dismissing them because of the procedural defect. The relief sought was under the Court's inherent jurisdiction not under the

Insolvency Act, so the service time limit was not relevant. The hearing cost would have been incurred regardless, once the decision to oppose the bankruptcy notices was made.

[185] In either case, the making of the applications and the pursuit of them to hearing may well have served the purpose that Mr ID submits they were intended to have, on his instructions from Mr KZ; namely, to delay matters while Mr KZ sought to negotiate final resolution with the judgment creditors.

[186] The greater difficulty with the pursuit of the applications to set aside is that they had no inherent merit. As Judge D pointed out at hearing,[18] the complainants did not rely on any of the available statutory grounds for setting aside bankruptcy notices such as seeking approval for terms of payment or the assertion of a counterclaim, set-off or cross-demand.

[187] Instead, they invoked the Court's inherent jurisdiction to prevent "an abuse of process". In doing so, they relied on a 1995 decision in which the Court held that "the existence of arguable grounds of defence to the claim for which judgment is given" could be argued in support of an "abuse of process" claim in relation to a default judgment.

[188] The 1995 decision, which appears to have been an example of the latent possibility mentioned at paragraph [129] above, was distinguished for the technical reasons in Judge D's decision to which reference can be made as required. The substance of the matter, in simple terms, was that it is not an abuse of process for a judgment creditor to capitalise on a fundamental mistake made by the debtors' lawyers.

[189] On an objective view, the vendors should never have been able to get summary judgment against the complainants and would, as likely as not, have been unsuccessful at ordinary hearing on the issue of the complainants' personal liability.

[190] Having enjoyed good fortune in obtaining judgement, however, they were entitled to exercise the enforcement remedies available to them. These included testing the complainants' solvency as a means of expediting the settlement previously agreed. The statutory clock was also ticking against the judgment creditors in relation to any application they might have wanted to make to bankrupt the complainants.

[191] Judge D noted that his dismissal of the complainants' applications to set aside the bankruptcy notices did not prejudice their rights to apply later for a halt to proceedings under ss 38 and 42 of the Insolvency Act.

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[18] *BY v KZ* [2014] NZHC XXX at [21].

[192] Overall, it seems that the applications to set aside the bankruptcy notices were not necessarily doomed to failure but were a very long shot. This is not to say that it was not legitimate for Mr ID to be fighting a rear-guard action for the complainants with every arguable legal weapon available as part of a considered legal strategy. The inherent jurisdiction argument was a bold one.

[193] Despite this, the evidence given by Mr KZ, albeit with the benefit of hindsight, would seem to indicate that an overall legal strategy was lacking.

[194] My perception is that the issues of service and pursuit of the applications to set aside the bankruptcy notices were of appreciably less significance than the other issues traversed above. They nevertheless form part of an overall assessment of the fairness and reasonableness of Mr ID's fees, not so much in terms of the results achieved as of the services provided.

Overall assessment

[195] I now turn to the need to stand back and consider all the circumstances and the fees charged "in the round".

[196] I disagree that the "service deficiencies" (i.e. Mr ID's failure to ensure timely service of the applications to set aside) had the materiality attributed to them by the Committee (on both occasions) and the costs assessor. In my view, "the complainants' bargaining position" was already adversely affected, to the point of them being boxed into a corner from which there was no way out, by the steps previously taken or not taken, either with or without the benefit of Mr ID's advice, between October 2013 and early February 2014.

[197] Ultimately, this was not Mr ID's fault. The event that triggered the waterfall of adversity for the complainants was undoubtedly the cancellation of the purchase agreement in the first place. It can be inferred from the fact of summary judgment (ignoring the trustee limitation of liability issue) that the complainants had no arguably valid grounds for cancellation.

[198] The complainants were nevertheless in the fortunate and possibly accidental position of having a legal "get out of jail card", assuming their claim to having no beneficial interest in the trust assets was well founded. The "possibly accidental" comment is because if the limitation of liability clause had been intentionally included in the purchase agreement by the complainants or their lawyers in negotiating the purchase agreement, they would presumably have been aware of it and relied on it when sued.

[199] From a legal perspective, the complainants' troubles plainly arose from the manifest error made by [law firm B] in failing to identify and/or advance the limitation of liability defence to the summary judgment application, probably compounded by a failure to recognise that they had made that error and to ensure that the complainants immediately received independent legal advice about either possible grounds for an appeal and/or a negligence claim against [law firm B].

[200] I accept Mr ID's submission (paraphrased) that the failure to serve the applications to set aside in a timely way was not sufficiently material either in itself or in terms of its implications for the complainants' bargaining position to warrant cancellation of the whole fourth invoice. The complainants did not have a bargaining position to preserve. To the extent that the applications were appropriate at all, which depended on the Court's reaction to the inherent jurisdiction argument, hearing costs would still have been incurred.

[201] I have no doubt that Mr ID did his level best to shore up the complainants' compromised legal position and that, aside from the unfortunate issue of the failure to serve the applications to set aside on time, he did so in a technically proficient and professionally appropriate way.

[202] Similarly, it seems clear that Mr ID cannot be criticised for failing to follow the instructions he and/or Mr JK received from Mr KZ, with the possible exception of Mr KZ's request for an evaluation of the prospects of success of an appeal in a preliminary application for leave to appeal.

[203] The bigger issue, in terms of value delivered, relates to Mr ID's response to the receipt of instructions that were, on the face of it, ill-considered and/or ill-informed and inconsistent with an ultimate commercial objective of minimising financial liability and cost.

[204] As the costs assessor rightly observed, "the essence of the complaints [does] not relate to whether the work was undertaken or whether that level of effort was required for the steps undertaken but rather whether all the steps were part of a competently conceived approach to the litigation and whether those steps were competently handled by Mr ID". The same comment is applicable to the fees assessment.

[205] On the information available to me, which does not include either contemporaneous file notes or any retrospective account of advice given at the time, it does seem that there was a lack of "big picture" guidance to Mr KZ at critical points in his own decision-making process at a time when he was under pressure and was not necessarily making good decisions.

[206] It may be that Mr KZ did not seek such guidance. It may also be that he might not have listened to it if given. It may be that it was given and was not heeded. I can make no findings regarding any of those matters.

[207] What is clear is that a number of legal processes were pursued that were unlikely if not highly unlikely to be of any ultimate benefit. While they were being pursued, Mr KZ made and acted on two critical decisions that compromised the complainants' position, namely the apparently unconditional agreement to pay the vendors and, most importantly, the compromise settlement of their claim against [law firm B].

[208] I again emphasise the findings already made that the course of events did not constitute a breach of r 3 other than in respect of the service time limit issue. In terms of assessment of value "in the round", however, there is a distinction between just doing one's job and doing a demonstrably valuable job.

[209] Although I consider there is an appreciable element of Mr KZ seeking to blame Mr ID for his misfortune rather than simply recognising that Mr ID was unable to extract him from that misfortune, I also consider there is a serious issue to address in terms of the overall value of the services provided by Mr ID.

[210] Expressed another way, there is value in managing legal process, there is greater value in wise counsel and there is potentially lesser value where the one is provided without the other.

(d) On the basis of my review of all the evidence, is there a persuasive basis for arriving at a conclusion that is different from that of the Committee?

[211] The Committee, on the basis of the costs assessor's report, arrived at a conclusion that I consider, for the reasons explained in this decision, to have been too narrow in its focus and too influenced by the perceived significance of the failure to serve the notices to set aside on time. I place considerably less weight on that issue.

[212] For the reasons explained above, I place considerably more weight on wider value-for-service issues that were not addressed in the Committee's decision despite the highly pertinent findings quoted at paragraphs [44]–[45] above.

[213] Mr ID's fees as charged (after adjustment) simply reflected the number of hours spent at the $350 hourly rate, without adjustment either upwards or downwards to reflect any consideration of the reasonable fee factors in r 9.1. The total fees charged on that basis (as adjusted) were $34,791 plus GST.

[214] Although I have noted that this calculation may have been unduly formulaic, I consider it to be a reasonable starting point. The Committee's order cancelling the adjusted fourth invoice of $10,290 plus GST represents a reduction of just under 30 per cent of that figure.

[215] As already stated, this Office needs good reason to depart from a properly considered Committee decision based on an independent costs assessor's report.

[216] If I had been approaching the matter without the benefit of the Committee's reasoning and solely on the basis of the overall value of the services provided "in the round", having regard to the arguable wastage of expenditure on Court applications that had little reasonable prospect of success despite the client's instructions to pursue them tempered by the appreciable risks Mr ID assumed (which would have justified a higher fee), I would have reached a similar conclusion.

[217] I therefore consider that the 30 per cent fee reduction constitutes the appropriate application of r 9, having regard to the provisions of r 9.1.

(e) Is there a more appropriate outcome than cancellation of the fourth invoice?

[218] I have considerable sympathy with the Committee's approach in the first Committee determination of awarding the complainants $15,000 compensation. Although the Committee's reasons for that approach are not recorded,[19] the inference I draw is that the Committee was seeking to overcome the narrow focus (at that time) of the complaint itself in reaching an overall financial outcome that it considered to be appropriate in the circumstances.

[219] As matters stand now, such an approach would not be appropriate. This is because, aside from the "causative link" issue, an award of compensation would mean that the fourth invoice remained theoretically payable. Because of the passage of time, recovery of that invoice by Mr ID is now statute-barred.[20]

[220] An award of compensation would therefore mean that Mr ID incurred a fresh liability to pay money to the complainants whilst having the stale benefit of an unrecoverable invoice. That would be unjust.

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[19] Paragraph [61] of the first Committee determination.
[20] The operation of s 161(1) of the Lawyers and Conveyancers Act 2006 does not affect the operation of the Limitation Act 2010.

[221] The Committee's orders in the fees decision included an order to refund any sums paid "by the complainants" in respect of the fourth invoice. The Committee made no reference to any sums that might have been paid by Mr ID's instructing solicitors.

[222] It is not safe for me to assume that [law firm A] did not meet their own obligation under r 10.12 of the Rules to pay Mr ID's invoice, which continued to apply (subject to r 10.12.1) regardless of the operation of s 161(1) of the Lawyers and Conveyancers Act 2006.

[223] If the parties have not long since moved on, they need to do so; particularly Mr ID. For all of the above reasons, I see no grounds that persuade me to depart from the Committee's decision dated 16 April 2021.

[224] The Committee recorded at paragraph [51] of the fees decision that the complainants had short-paid Mr ID's invoices by $11,768.51 as at August 2014. If that remains the factual position now and assuming the figure was GST-inclusive, Mr ID would owe the complainants $64.99 as a result of this decision.

[225] A certificate pursuant to s 161(2) of the Lawyers and Conveyancers Act 2006 accompanies this decision.

Costs

[226] Where an adverse finding is made, costs will be awarded in accordance with the Costs Orders Guidelines of this Office. I consider this matter to be of average complexity. It follows that Mr ID is ordered to pay costs in the sum of $1,200 to the New Zealand Law Society within 30 days of the date of this decision, pursuant to s 210(1) of the Act. This is in addition to the costs order made by the Committee in the fees decision.

Enforcement of costs order

[227] Pursuant to s 215 of the Act, I confirm that the order for costs made by me may be enforced in the civil jurisdiction of the District Court.

Publication

[228] Mr ID is permitted to disclose the full text of this decision to his insurer and to his instructing solicitors, as required.

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

Decision

Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the decision of the Standards Committee is confirmed but modified to remove the words "by the complainants" from paragraph [50(b)] of that decision.

DATED this 7TH day of SEPTEMBER 2023

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F R Goldsmith
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 ID as the Applicant
Mr KZ and Ms UG as the Respondents
[Area] Standards Committee [X]
New Zealand Law Society

LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

LCRO 069 /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] of the New Zealand Law Society
BETWEEN	**ID** Applicant
AND	**KZ and UG** Respondents

Certificate pursuant to s 161 of the Lawyers and Conveyancers Act

It is hereby certified that:

If the sum of $11,768.51 that remained unpaid by the Respondents to the Applicant in August 2014 remains unpaid now, the fee refund owed by the Applicant to the Respondents in respect of the sum of all the bills of costs rendered by the Applicant to the Respondents is **$64.99**.

If the sum of $11,768.51 that remained unpaid by the Respondents to the Applicant in August 2014 was subsequently paid, the fee refund owed by the Applicant to the person who paid that sum, in respect of the sum of all the bills of costs rendered by the Applicant to the Respondents, is **$11,833.50**.

This certification is made pursuant to s 161 of the Lawyers and Conveyancers Act 2006 and under the determination of the Standards Committee dated 16 April 2021 and the decision of the Legal Complaints Review Officer dated 7 September 2023.

DATED this 7th day of September 2023

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FR Goldsmith
Legal Complaints Review Officer