LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2022] NZLCRO 126

Ref: LCRO 103/2021
LCRO 058/2022
LCRO 104/2021
LCRO 105/2021

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**GS** Applicant
AND	**ABC LTD and HY** Respondents
AND	
BETWEEN	**[LAW FIRM A]** Applicant
	ABC LTD and HY Respondents
AND	
AND	**SW** Applicant
BETWEEN	**[AREA] STANDARDS COMMITTEE [X]** Respondent
AND	

DECISION

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

Introduction

[1] Mr GS has applied for a review of a decision by [Area] Standards Committee [X] (LCRO 103/2021), dated 3 June 2021.

[2] That decision addressed complaints that had been made against Mr GS and [LAW FIRM A] ([LAW FIRM A]) (trading as [LAW FIRM B]), and an own motion inquiry concerning Mr SW.

[3] Mr SW and [LAW FIRM A] ([LAW FIRM A]), filed applications for review of the 3 June 2021 decision at the same time (LCRO 105/2021 and LCRO 104/2021).

[4] [Area] Standards Committee [X] also issued a decision on publication following the issue of its substantive decision.

[5] Mr GS filed an application to review the publication decision (LCRO 58/2022).

[6] It is appropriate that the four review applications be addressed in a single decision.

Background

[7] The background to the complaints is comprehensively set out in the Standards Committee's decision of 3 June 2021.

[8] In 2014, Ms HY entered into an agreement to purchase a commercial unit. She purchased the unit off the plans. The premises were located in a mixed commercial/residential unit title development "[PROPERTY A]" situated in [ROAD], [CITY A].

[9] It was Ms HY's intention to use the premises as a dairy.

[10] In 2016, Ms HY nominated her company ABC Ltd (ABC Ltd) to take ownership of the unit.

[11] Settlement of the purchase was scheduled for January 2017. Ms HY was overseas at the time settlement was finalised.

[12] On return to New Zealand, Ms HY was unhappy with the condition of the unit. In particular, she was concerned that ducting in the ceiling of the unit was connected to an extraction system for adjoining units. These units were operating as restaurants. Air was being discharged from the restaurants directly onto the entrance of ABC Ltd's unit.

[13] ABC Ltd tenanted the unit, but subsequently terminated the lease as a consequence of the tenant becoming disgruntled with the odours being discharged at the entrance to the unit.

[14] Ms HY instructed the lawyers who were acting for her at this time to write to the developer making demand for removal of the ducting. This request was not responded to.

[15] In or around May 2017, Ms HY/ABC Ltd instructed [LAW FIRM A] to act for her. Mr GS, an employee of [LAW FIRM A], had responsibility for most of the work completed, and was assisted by another employee of the firm, JC.

[16] Initial steps taken by [LAW FIRM A] to persuade the vendor or developer to remove the ducting proved fruitless. Demand was made of the owner/occupiers, occupying adjoining units, to discontinue using the ducting. Those efforts failed to yield any positive results for Ms HY.

[17] In September and October 2017, [LAW FIRM A] provided Ms HY with possible options including:

(a) commencing proceedings against the developer and/or adjoining unit owners/occupiers; or

(b) ABC Ltd removing the ducting followed by steps to recover damages.

[18] In July 2018, Ms HY instructed a contractor to remove the ducting.

[19] On 11 July 2018, [LAW FIRM A] gave notice to the owners and occupiers of the adjoining units that the ducts had been blocked. Lawyers instructed for the owners of the adjoining units responded with demand that the ducts be reinstated. It was submitted for the owners that the ducting comprised a component of the infrastructure of the development, and therefore was the responsibility of the body corporate.

[20] In August 2018, the body corporate convened a meeting which was attended by the lawyers for the parties involved in dispute. It was the body corporate's view that ABC Ltd must reinstate the ducting.

[21] In September 2018, the body corporate made application to the Tenancy Tribunal seeking orders that ABC Ltd reinstate the ducting and pay the body corporate's costs.

[22] The hearing was scheduled to be heard by the Tenancy Tribunal in December 2018.

[23] Prior to the hearing, [LAW FIRM A] filed a cross application. Argument was advanced, that the ducting was not authorised under the Building Code.

[24] The hearing underwent a prolonged process in the Tribunal, with a decision ultimately being issued at the end of July 2019.

[25] The Tribunal determined that:

(a) the ducts were infrastructure under the UTA; and

(b) the body corporate was required to repair and reinstate the ducts; and

(c) the adjoining owners' use of the ducts was protected by s 73 of the Unit Titles Act 2010 (UTA); and

(d) issue as to whether the ducts had Council consent did not affect the UTA provisions; and

(e) the Tribunal was not the appropriate forum to determine the illegality issue but in the event it was required to do so, it concluded that the ducts were lawful.

[26] The Tribunal ordered ABC Ltd to repair and reinstate the ducting,[1] to pay the body corporate's reasonable costs, and to reimburse the body corporate for the reasonable cost of the proceedings.

[27] In its order on costs issued in October 2020, the Tribunal ordered ABC Ltd to pay the body corporate costs of $37,838.17.

[28] Ms HY terminated [LAW FIRM A]'s retainer. At the time the retainer was ended, she had incurred legal costs (including GST and disbursements) of close to $70,000.

[29] [LAW FIRM A] ceased operating as a law firm in January 2020. A new incorporated firm was created, [LAW FIRM C], trading as [LAW FIRM C] ([LAW FIRM C]).

[30] The newly constituted firm had three directors including Mr SW and Mr GS.

The complaint and the Standards Committee decision

[31] Counsel for ABC Ltd lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 17 December 2019.

[32] The complaint filed was comprehensive. it was articulated in a 13-page summary which provided both background of the circumstances leading to the complaint,

[1] That work had apparently been completed prior to the Tribunal hearing.

and a detailed account of the specific areas in which it was alleged that the [LAW FIRM A] lawyers had failed to provide competent advice to ABC Ltd.

[33] The nub of ABC Ltd's complaint was allegation that the lawyers had failed to competently represent ABC Ltd.

[34] ABC Ltd's complaint was that the lawyers:

(a) had held themselves out as experienced litigation lawyers who had a particular experience in managing commercial and property cases; and

(b) failed at commencement to identify the fundamental legal issues; and

(c) had erroneously advised Ms HY that she had grounds for a cause of action against the developer of the complex when such cause of action was specifically excluded by the agreement for sale and purchase; and

(d) had mistakenly advised ABC Ltd that the ducting installed in ABC Ltd's premises was illegal; and

(e) had promoted a litigation strategy throughout the lengthy litigation which had been exposed by the Tenancy Tribunal as being fundamentally flawed; and

(f) had failed to identify the fundamental ducting defects and advise ABC Ltd accordingly; and

(g) had failed to recognise the appropriate legal remedies that were available to ABC Ltd; and

(h) had, in advising ABC Ltd that the ducting could be removed, failed to recognise that such steps, if taken, would be both contrary to the UTA and the body corporate's operational rules; and

(i) had failed to recognise that the extraction system in the building was part of the building's infrastructure (and in part common property) and could not be removed without the permission of the body corporate; and

(j) had been put on notice by various affected parties that the ducting could not be legally removed without steps first being taken to secure the consent of the body corporate; and

(k) notwithstanding warnings given that the ducting could not be removed, had persisted with their advice to ABC Ltd that the ducting could be removed; and

(l) should have (in light of the objections raised) reconsidered advice that removal of the ducting was a reasonable and appropriate remedy as could be expected of a lawyer acting reasonably competently; and

(m) subsequent to the ducting being removed, had received warnings from multiple sources that the steps taken to remove the ducting were illegal; and

(n) had inappropriately advised ABC Ltd to resist attempts by the body corporate to gain access to the unit to reinstate the ducting; and

(o) had written to the body corporate making demand that the body corporate not repair or maintain the extraction system; and

(p) had failed to recognise that the extraction system was part of the building's infrastructure, and that it fell to the body corporate to ensure that the infrastructure was properly maintained and repaired; and

(q) had failed to appropriately address the legal framework within which bodies corporate and owners operate, and particularly, the rights and obligations which those parties owe to the other; and

(r) had failed to identify that the ducting was a body corporate responsibility, and that the body corporate was responsible for the nuisance that was the subject of ABC Ltd's fundamental concern; and

(s) had negligently represented ABC Ltd in the Tribunal proceedings in that the defence and counterclaim advanced by the lawyers proceeded on a narrow and misconceived illegality argument; and

(t) had failed to recognise that a straightforward, effective and obvious remedy was available to ABC Ltd; and

(u) had failed to advance relevant arguments to the Tenancy Tribunal as an alternative to the illegality argument on which it placed reliance, and neglected to seek orders from the Tribunal which would remedy the nuisance issue;

(v) had failed to identify the regulatory requirements for restaurant ducting/discharge to be cleaned prior to point of exit from the building; and

(w) had failed to obtain appropriate expert advice on the issues with the defects in the ducting system; and

(x) had raised irrelevant arguments in the course of the Tribunal proceedings, which had contributed to a significant escalation in costs; and

(y) had failed to identify that once the ducting had been reinstated, the body corporate's application became moot; and

(z) had discouraged ABC Ltd from settling the dispute when opportunity had presented for it to do so; and

(aa) had exposed ABC Ltd to risk of damage claims being brought against the company; and

(bb) had, as a consequence of adopting an unnecessarily aggressive and entrenched approach, compromised ABC Ltd's relationship with the body corporate and neighbouring unit owners; and

(cc) charged fees that were excessive; and

(dd) had failed to sufficiently explain the risks of litigation to their client; and

(ee) had charged for work that was unnecessary or of negligible value to ABC Ltd; and

(ff) had, as a result of the approach adopted, made issues that were neither complex or novel unduly complicated by continuing to advance an argument which was ignoring of obvious and straightforward remedies that were available to their client; and

(gg) should never have provided advice to ABC Ltd that the company could remove the ducting, and

(hh) gave no indication of having insight into the errors made and regrettably, sought to shift responsibility for the outcome to the Tribunal and their client.

[35] By way of outcome, ABC Ltd sought:

(a) reimbursement of fees paid during the course of the retainer in the sum of $53,550; and

(b) direction that the company not be required to pay the balance of outstanding fees in the sum of $15,588.64; and

(c) compensation for the Tenancy Tribunal costs award of $37,838.17; and

(d) any further orders considered "appropriate" in the circumstances; and

(e) an order releasing [LAW FIRM D] from an undertaking that it pay fees held on account to the lawyers.

[36] Mr KZ, for the lawyers, responded to the complaint on 11 March 2020. His response was, understandably, in view of the raft of issues raised by the complaint, comprehensive.

[37] It was submitted for the lawyers that:

(a) the issues engaged by the dispute, whilst initially presenting as straightforward, were complex; and

(b) ABC Ltd had made a number of attempts to directly resolve issues with the ducting directly with the developer prior to instructing the lawyers; and

(c) the initial estimate of likely fee was based on information provided at the time of engagement; and

(d) the body corporate had been copied into initial correspondence with the developers and alerted to the problems; and

(e) despite Ms HY contacting the lawyers frequently to discuss various issues, it had been difficult to obtain focused instructions from Ms HY; and

(f) no representations had been made to Ms HY that the lawyers were "experts in unit title and body corporate law"; and

(g) the firm's speciality was in communicating with, and serving, the [REDACTED] community; and

(h) the matter evolved, from a defective real property matter, into a nuisance and trespass matter, and subsequently a "unit title matter"; and

(i) the body corporate had failed to respond to communications forwarded to it; and

(j) it had "always" been the lawyers' recommendation to Ms HY that she sue the developer or alternatively the owners of the adjoining units and only take steps to remove the ducting once a judgement had been obtained as this approach was "safer"; and

(k) Ms HY's instructions were that it was her preference to remove the ducting and respond to threat of litigation from the adjoining owners if that eventuated as she was reluctant to expend costs on litigating the dispute; and

(l) this approach was emphasised by Ms HY to be her preferred approach on several occasions; and

(m) Ms HY had engaged in direct negotiations with the body corporate, and had informed the lawyers that the body corporate had agreed to modify the ducting in the unit, this work to be completed at the cost of the developer;[2] and

(n) Ms HY had sought an opinion from another lawyer as to her options, and

(o) her instructions, which she had repeatedly advanced to the lawyers, were that she was reluctant to commence proceedings against the body corporate; and

(p) the lawyers considered that the ducting was illegal given that there was no encumbrance in favour of the adjoining units and that it was open to Ms HY to remove the ducting, but this advice was accompanied with warning of possible adverse consequences for Ms HY; and

(q) fees charged for preliminary work were modest; and

(r) the lawyers were not put on notice of a formal quotation having been obtained for the installation of exhaust scrubbers; but

[2] I can see no evidence on the file of communications between the lawyers' client and the body corporate. However, an email from Mr SW to the body corporate, on 20 September 2017, records that the body corporate and Mr SW's client had been discussing proposals to redirect the ventilation.

(s) in any event, the lawyers did not consider that the extraction system could be altered without securing a building consent; and

(t) if the lawyers' attention had been drawn to the advice regarding possible installation of a scrubbing device, this information must have come from their client and Ms HY's decision to proceed with removing the ducting was a decision taken by her with full knowledge of the alternatives available; and

(u) Ms HY was reluctant to seek the body corporate's consent to her plan to remove the ducting; and

(v) in the period December 2017 to June 2019, a number of events relevant to the ducting issue occurred which the lawyers learnt of "much later", including Ms HY's ongoing and direct involvement with the body corporate and owners of adjoining units over the ducting issues and the body corporate taking steps to install an extraction fan; and

(w) the extent to which Ms HY was engaged in directly negotiating with various parties is understated by her; and

(x) on 15 June 2018, Ms HY made a unilateral decision to remove the ducting and simply sought advice from the lawyers as to steps she could take if the adjoining unit owners attempted to obstruct the removal process; and

(y) the body corporate had throughout refused to co-operate in attempts to solve the problem; and

(z) the body corporate had taken the view that ABC Ltd's grievance was with the developer and had to be resolved by her directly negotiating with the developer; and

(aa) the body corporate's error was in failing to recognise that a failure to have the ducting consented, meant that the ducting should be removed; and

(bb) when discussion focused on possibility of removing the ducting, at no stage did the body corporate raise argument that the ducting constituted building infrastructure; and

(cc) at the meeting of the body corporate convened on 22 August 2018, the body corporate failed to address the legitimate concerns raised, focusing solely on its insistence that ABC Ltd reinstate the ducts; and

(dd) Ms HY was resolute in her instructions that she would not “back down” and reinstate the ducting; and

(ee) Ms HY was informed of the possibility that she could incur an order for costs, when advised that the body corporate was proposing to commence proceedings; and

(ff) Ms HY was informed, that she would need to be prepared to meet argument head-on that the ducting was legal or alternatively that it was illegal for her to remove the ducting, and that it would be appropriate for her to consult an expert for advice on the issue as to whether a consent was required prior to her taking steps for removal; and

(gg) advice she had received was that as no consent had been granted for installation at commencement, no consent was required for removal; and

(hh) at the time the body corporate commenced its proceedings in the Tenancy Tribunal around 11 September 2018, Ms HY was adamant that she wished to defend the proceedings, this view reinforced by the advice she had received from the council, and her own discussions with various individuals; and

(ii) Ms HY was not a “clueless” and ill-informed client; to the contrary, she was an experienced businesswoman who owned and controlled a property portfolio valued in excess of $30 million; and

(jj) advice was received from [CITY A] Council confirming that there was no evidence that the installed ducting had been consented, and that appropriate consents had been required prior to installation; and

(kk) in the course of the retainer, Ms HY advised the lawyers that she had engaged fresh counsel, who had managed to broker a deal with the body corporate; and

(ll) Ms HY was advised that it was her prerogative to change lawyers, but on reflection Ms HY decided that she wished to remain with [LAW FIRM A], and for them to continue with their work; and

(mm) extensive research and preparation had been completed for each of the Tribunal hearings; and

(nn) the argument advanced to the Tribunal was the product of an extensive amount of research and analysis; and

(oo) advice provided that the ducting was illegally installed was not negligent, and therefore could not amount to negligent advice; and

(pp) the Tribunal had, in placing reliance on the evidence of an applicant's witness, ignored the overwhelming body of evidence in law that stood against the evidence that the witness had produced to the Tribunal; and

(qq) the Tribunal had made significant errors; and

(rr) subsequent to the Tribunal delivering its decision, the lawyers had agreed to advance an appeal of the Tribunal's decision, on the basis of charging Ms HY a fixed fee for the appeal; and

(ss) Ms HY subsequently instructed fresh counsel and made request to uplift her file; and

(tt) the amount of time spent by the Tribunal traversing the issues reflected the contestability of the arguments advanced; and

(uu) unsatisfactory outcome did not in itself provide basis for ABC Ltd to advance complaint that the company had not been competently represented; and

(vv) the body corporate failed to adopt a "neutral" position in the Tribunal proceedings; and

(ww) Ms HY's preparedness to consider alternative remedies, was limited by her commitment to achieving an outcome which involved the ducts being entirely removed from her unit; and

(xx) the lawyers' illegality argument was correct, or at the very least arguable; and

(yy) Ms HY's consistent instructions were that she did not wish to engage the body corporate in litigation; and

(zz) Ms HY's consultation with other lawyers, and specialist advisers, reinforced her belief in the case being advanced by the lawyers; and

(aaa) criticism of the lawyer's failure to engage with the body corporate failed to have sufficient regard to the persistent refusal of the body corporate to become involved in the dispute.

[38] Ms FQ (for Ms HY) provided a reply to the lawyers' response to Ms HY's complaint on 14 May 2020. It was submitted for Ms HY that the lawyers had:

(a) failed at every step of their engagement to fulfil the fundamental obligations and duties of care to Ms HY; and

(b) provided erroneous advice in respect to the issue as to whether Ms HY could legally remove ducting from her unit, and improperly counselled Ms HY to defend the proceedings brought in the Tenancy Tribunal by the body corporate; and

(c) neglected to identify and properly alert Ms HY to the appropriate legal remedies available to her; and

(d) notwithstanding having been put on notice that the ducting could not be legally removed, persisted with their advice to Ms HY that she could proceed with steps to remove the ducting;

(e) failed to understand the nub of Ms HY's complaint, in that the lawyers were not criticised for running the illegality argument, but rather they had persisted in running that argument alone when there were two "self-evident and straightforward causes of action available to ABC Ltd;" and

(f) failed to have specifically put the unit title breaches and nuisance in issue in the Tribunal proceeding as any reasonably competent general litigator would; and

(g) charged $70,000 in fees for what should have been a straightforward nuisance and Unit Titles matter was prima facie excessive; and

(h) failed to advise ABC Ltd of the risks of the litigation.

[39] The lawyers filed a further response to the complaint on 30 November 2020. This response was filed on behalf of Mr GS, [LAW FIRM A] and Mr SW. Mr SW had, at this stage, been joined as a party to the complaint as a consequence of the Standards Committee's decision to commence an own motion inquiry.

[40] The submission filed by the lawyers on 30 November 2020 replicated in significant part, matters addressed in the comprehensive response to the complaint that had been earlier filed (and summarised at length here). To the extent that the submission raised fresh matters (particularly in responding to complaint that Mr SW had failed to adequately supervise Mr GS), it was submitted that:

(a) Mr GS was a very experienced lawyer who had a track record of successfully representing clients in a number of High Court proceedings; and

(b) Mr GS's experience and competence was such that he did not require to be supervised by Mr SW; but in any event, Mr SW did maintain a close watching brief over the file and had been directly involved in arguing the case at the first Tribunal hearing; and

(c) Neither Standards Committees nor the LCRO are substitutes for the civil courts; and

(d) Ms HY's case was not straightforward; and

(e) The gravity of the offending (if established) should be assessed as at the lower end of the spectrum and not requiring of a publication order.

[41] The Standards Committee identified the issue to be addressed in its investigation of ABC Ltd's complaint as being whether, in providing legal services to Ms HY and ABC Ltd, the conduct of the lawyers fell short of the required standard of competence and diligence (r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules) and s 12(a) of the Lawyers and Conveyancers Act 2006 (the Act)). The Committee considered the elements of the complaints it was required to address as including:

(a) advice that ABC Ltd had a cause of action against the developer (bearing in mind cl 6.3 of the agreement for sale and purchase); and

(b) "illegality arguments" – that if the ducts were "illegal", ABC Ltd was legally entitled to remove them: that if the ducts were "illegal", the body corporate was not obliged to maintain them; and

(c) failing to recognise that the ducts were "infrastructure" for the purposes of the Unit Titles Act 2010; and

(d) a lack of advice about the discharged air being an "objectionable discharge"; and

(e) insufficient advice about requiring body corporate consent; and

(f) advising against giving the body corporate access to the unit; and

(g) defending the Tenancy Tribunal proceedings solely on the narrow "illegality" argument; and

(h) whether the lawyers' fees exceed an estimate given, and if so, did they fail to inform Ms HY and/or ABC Ltd promptly if and when it became apparent that the fee estimate was likely to be exceeded (r 9.4); and

(i) whether the lawyers charged ABC Ltd more than a fee that was fair and reasonable for the services provided (r 9), this to include consideration of all relevant reasonable fee factors at r 9.1, such as (but not limited to) any estimate given and the results achieved for the client; and

(j) whether Mr SW failed to ensure that the conduct of Mr GS and JC was at all times competently supervised and managed (r 11.3)?

[42] The Standards Committee delivered its decision on 3 June 2021.

[43] The Committee determined, pursuant to s 152(2)(b) of the Act, that there had been unsatisfactory conduct on the part of Mr GS and Mr SW in terms of ss 12(a) and (c) (failure to meet required standards of competence and diligence) and unsatisfactory conduct on the part of Mr SW pursuant to s 152(2)(b) of the Act, in that Mr SW had failed to ensure that Mr GS and Mr JC were competently supervised and managed.

[44] The Committee concluded that:

(a) in several instances, the lawyers had failed to "get the law right", where a reasonably competent lawyer would have; and

(b) the lawyers had made a number of strategic errors, in particular, encouraging Ms HY to proceed with removing the ducting, and defending the Tenancy Tribunal proceedings solely on the basis of the "illegality" argument, rather than by reference to the broader obligations on the body corporate; and

(c) the outcome achieved for the client (or lack of outcome) demanded consideration; and

(d) whilst Mr GS had carried out most of the work, the failings were also attributable to Mr SW, taking into account his position as principal of the firm and his support for the decisions made; and

(e) work completed had no value for the lawyers' client, and as such, in the circumstances, the "only fair and reasonable fee was no fee"; and

(f) Mr SW had failed to ensure that the work of Mr GS and Mr JC was at all times competently managed.

Application for review and response

[45] Mr GS and [LAW FIRM A] filed applications for review on 21 July 2021. The applications filed (identical in content) were presented on behalf of the lawyers and the law firm by Mr KZ.

[46] Mr OX (for Mr SW) filed an application to review the Committee's decision, that application also filed on 21 July 2021.

[47] Mr KZ submits that:

(a) the Committee had failed to address a number of the relevant legal issues; and

(b) the lawyers had a legitimate expectation that the Committee would address each of the specific issues that had been identified as matters to be considered as part of its conduct investigation; and

(c) the Committee had erred in its conclusion that the lawyers had failed to meet the minimum standards of competence and diligence; and

(d) the Committee had failed to pay sufficient weight to the arguments advanced for the lawyers, and in particular, to recognise that the essence of litigation is the testing of legal positions; and

(e) the Committee had failed to provide supporting reasons for conclusion reached that the lawyers had failed to correctly apply the relevant law; and

(f) the Committee had failed to identify a "glaring" mistake made by the lawyers such as would support and justify its finding that the lawyers had failed to act competently; and

(g) the Committee's decision failed to recognise that the argument advanced by the lawyers was the result of a careful analysis of the legislative framework; and

(h) no legal authority had been cited to support the Committee's conclusion that the lawyer's illegality argument lacked validity; and

(i) the Committee erred in conclusion that the lawyers were wrong to advance argument that "illegal" ducting cannot be considered infrastructure for purposes of the UTA; and

(j) the Committee's decision paid insufficient regard to the fact that [CITY A] Council had concluded that the ducts were unlawful as they remained unconsented; and

(k) the duration of the Tenancy Tribunal hearing (spread over three hearing days) stood as testimony to the complexity of the issues being traversed; and

(l) if the positions advanced by the lawyers were so manifestly wrong as is contended, it could have been expected of the Tenancy Tribunal that the application would have been dispensed with in short order; and

(m) a lack of successful outcome did not properly translate to a finding that the lawyers had failed to competently represent their client; and

(n) if it was accepted that the lawyers had acted competently, it necessarily and inevitably followed that the Committee's decision to reverse the fees must fall away; and

(o) in any event, not all of the fees charged related solely to the Tenancy Tribunal proceedings; and

(p) it cannot be said that all of the work completed had no value to the client; and

(q) in directing an order for compensation, the Committee failed to give sufficient consideration to the issue as to whether Ms HY/ABC Ltd's conduct was a contributing factor to the loss suffered; and

(r) the fine imposed on Mr GS was excessive and the Committee had failed to provide explanation for setting the fine in the upper region.

[48] Mr OX submitted for Mr SW that:

(a) The Standards Committee had erred in fact and in law; and

(b) If Mr SW had been accorded opportunity for a hearing in person, he would have had proper opportunity to respond to the complaint; and

(c) The Committee had failed to provide adequate reasons to support its various findings.

[49] Ms FQ provided a response to the review applications on 6 August 2021. She responded to each of the applications with a single reply.

[50] Ms FQ submitted that:

(a) ABC Ltd supported the decision of the Standards Committee; and

(b) relied on the documentation that had been provided to the Committee; and

(c) the Notice of Hearing issued by the Committee identified the issues the Committee considered central to its investigation, and opportunity was provided to the parties to comment; and

(d) the applications for review fail to identify any substantive procedural unfairness or error in the decision-making process that arose as a consequence of the hearing proceeding "on the papers"; and

(e) Mr SW and Mr GS were given opportunity to be heard on the issues of costs and penalty; and

(f) The review applications failed to identify any error in the monetary and costs awards; and

(g) no procedural fairness issues arose as a consequence of the Committee issuing a combined substantive and monetary/penalty decision.

Hearing

[51] A hearing proceeded on 29 June 2022. Mr GS was represented by Mr KZ, Mr SW by Mr OX, and ABC Ltd (and Ms HY) by Ms TA. In the course of the hearing, both Mr SW and Mr GS were also given opportunity to speak to their respective review applications.

[52] The submissions advanced on review in significant part canvassed matters that had been traversed in the comprehensive written submissions. I do not propose to summarise the parties' positions further, but rather to highlight the issues that were advanced by counsel as being critical to their respective clients' positions.

[53] Mr OX was critical of the process that had been followed by the Committee in the course of conducting its investigation. It was his contention that:

(a) the issues engaged by the complaint were more appropriately addressed as a negligence claim rather than through the vehicle of a conduct complaint; and

(b) an "on the papers" hearing was unsuitable; and

(c) the reasons provided by the Committee were "utterly inadequate"; and

(d) the Committee had failed to get the law right; and

(e) penalties imposed were excessive; and

(f) the Committee should have conducted a separate hearing on penalty;

(g) absent from the Committee decision was any evidence of Ms HY's position being subjected to the scrutiny that a fair investigation demanded.

[54] Mr KZ reinforced argument that:

(a) the Committee had paid insufficient attention to the extent that Ms HY (an informed and capable client) had been emphatic in the instructions she had provided to the lawyers; and

(b) in particular, Ms HY's determination that the issues be traversed in the Tenancy Tribunal.

[55] Ms TA submitted that:

(a) the steps taken by the lawyers in the course of advising ABC Ltd, viewed in their totality, reflected a series of misjudgements and errors; and

(b) the advice to remove the ducting was "extraordinary"; and

(c) it was inconceivable that a competent lawyer would advance the position that the dispute did not require the engagement of the body corporate; and

(d) the illegality argument advanced was tenuous and should never have been relied on as a pivotal argument in the Tenancy Tribunal.

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:[3]

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

[57] More recently, the High Court has described a review by this Office in the following way:[4]

> 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.

[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 decision; and

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

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

Discussion

[59] The issues to be addressed on review are:

(a) Should Mr PR's opinion be accepted into evidence?

(b) Was the Committee's investigation marred by procedural irregularities?

(c) Were the issues raised by the complaints matters that should more appropriately have been addressed in an action brought in negligence, rather than through the vehicle of professional conduct complaint?

(d) Did the lawyers provide competent advice to their client, with reference to:

(i) the approach to examining competency (see page 37);

(ii) initial steps taken by the lawyers (see page 42);

(iii) the lawyers' advice as to potential consequences of removing the ducting (see page 46);

(iv) the lawyers' response to the proceedings filed by the body corporate in the Tenancy Tribunal (see page 53);

(v) costs (see page 58);

(vi) conclusions on competency (see page 69).

(e) Were the fees charged fair and reasonable?

(f) If it is established that the lawyers failed to provide Ms HY with competent advice, did that failing merit or require the unsatisfactory conduct findings?

(g) If the Committee was correct to conclude that the lawyers' conduct constituted unsatisfactory conduct, were the penalties imposed consequential on those findings appropriate?

Analysis

Should Mr PR's opinion be accepted into evidence, and if so, what weight should properly be accorded that evidence

[60] Shortly prior to the review hearing proceeding, Mr KZ filed an opinion that had been prepared by Mr PR.

[61] The opinion was headed “expert opinion”.

[62] Mr PR is a respected and recognised expert in the area of unit tiles.

[63] He prefaced his opinion with a brief account of his background and noted that he had authored and co-authored texts focusing on unit titles and had argued a number of cases before the Tenancy Tribunal.

[64] Mr PR explained that he had been instructed to provide an opinion as to whether the arguments advanced by the respondents in the Tenancy Tribunal, were “plausible and arguable”.

[65] The initial question to address, is whether Mr PR’s opinion, being clearly fresh and new evidence provided at very late stage in the review process, should be considered.

[66] An LCRO will be reluctant to accept new evidence filed on review, unless there are sound reasons for it to do so. Those reasons fall within the parameters of the conventional circumstances in which courts have considered it appropriate to accept evidence that has been filed late in the piece.

[67] It is important to emphasise the particular characteristics of the review process.

[68] As Winkelmann J (as she then was) noted in *Deliu v Hong,* a review by an LCRO is not the equivalent of a general appeal as the Act “creates a very particular statutory process”.

[69] When commencing a review, it can be expected that all the relevant information that the parties wished to have considered in both advancing and responding to the complaint, has been squarely put before the Standards Committee.

[70] The review process is not intended to provide opportunity to parties to adduce fresh or new evidence at the review stage. A Review Officer must be cautious to ensure that he or she does not get cast into the role of a “first instance” determiner of the evidence. Such an approach, if permitted, would undermine the very process of review.

[71] The role of the Review Officer is to look afresh at the material that was put before the Committee, and to bring a robust and independent approach to an assessment of that material.

[72] That said, inevitably on occasions, parties will seek to put evidence before the Review Officer that was not put before the Standards Committee.

[73] In those circumstances, a Review Officer will consider:

(a) whether the evidence that is sought to be produced, was evidence that was available at the time the Standards Committee was conducting its investigation; and

(b) if the evidence was available, reasons as to why the party seeking to rely on the fresh evidence was unable to produce the evidence to the Standards Committee.

[74] The approach adopted by LCROs to the consideration of fresh evidence, is reinforced to the parties in the review guidelines provided.

[75] The question as to whether fresh evidence should be accepted can be a finely balanced one for a Review Officer and one, that on occasions, requires a pragmatic approach from the Review Officer.

[76] But if the evidence is considered to be significantly material to the issues engaged by the review, a Review Officer will frequently conclude that they have no option but to return the matter to the Standards Committee for further consideration.

[77] I have considerable reservations about permitting Mr PR's evidence to be admitted at late stage.

[78] In both the advancing of and responding to the complaint, both parties filed comprehensive submissions.

[79] The beating heart of the complaint was allegation that the lawyers had failed to provide ABC Ltd with competent advice and had remained steadfastly committed to a litigation strategy based on argument that the ducting installed was illegal, when more obvious and appropriate remedies were available.

[80] The issue before the Standards Committee, was the question as to whether the steps taken by the lawyers were steps that a competent lawyer could reasonably, in the circumstances of the particular case, have taken.

[81] Mr PR considered the litigation strategy adopted by the lawyers was a reasonable one for them to have adopted.

[82] The question that arises, is why this evidence was not put before the Standards Committee. It is evidence that the lawyers could have been expected to have acquired,

and made available to the Committee at the time the conduct investigation was proceeding.

[83] It is surprising that the lawyers appeared to have given no consideration to acquiring an independent overview of the steps they had taken, and to have taken steps to put that information before the Standards Committee.

[84] Mr GS and Mr SW, in responding to the conduct complaints, emphasised that they were experienced and competent lawyers.

[85] Mr KZ was questioned at the hearing as to why the lawyers had not taken steps to provide the Standards Committee with evidence in the nature of that which was sought to be produced on review.

[86] His response was that the lawyers had confidence in the explanations that they had provided to the Standards Committee, and were confident in their conviction that they were on strong grounds in advancing the illegality argument.

[87] The lawyers seek to bolster their position by asking the Review Officer to take into consideration evidence that they had not considered necessary to acquire and put before the Standards Committee.

[88] If I was, as I am invited to do by the lawyers, inclined to reverse the Standards Committee decision in reliance on the fresh evidence provided by Mr PR, I would be overturning the Committee's decision on the basis of having:

(a) accepted Mr PR's opinion as being authoritative on the critical issue; and

(b) determined the review by reference to significant evidence that was not available to the Standards Committee; and

(c) determined the review without adequate opportunity being provided to the applicant to respond to Mr PR's opinion.[5]

[89] I have given careful consideration to the opinion provided by Mr PR.

[90] Whilst Mr PR's knowledge and experience in what is a specialist area of the law (Unit Titles) must be, and is, respected, there are obvious limitations to the opinion

[5] Ms TA explained that she had been instructed at late notice to appear at the review hearing. She had limited opportunity to consider Mr PR' opinion, but nevertheless, was strongly opposed to the opinion being accepted into the review hearing evidence.

provided when that opinion is examined with reference to the broader scope engaged by the disciplinary inquiry. Mr PR himself acknowledges those limitations.

[91] Mr PR notes that the scope of his opinion is "limited", and observes that in preparing his opinion, he had not had opportunity to "consider all aspects of the file or the complaint".

[92] Mr PR confirms that his opinion focuses on the decision of the Tenancy Tribunal, and he notes that he does not propose to comment on "all the advice given".

[93] In directing his focus to the Tribunal decision, Mr PR concludes that the arguments advanced by the lawyers were, in his view, reasonable arguments to advance.

[94] This is conclusion that the lawyers understandably place considerable reliance on. But in making request of a Review Officer to accept evidence of this nature at this late stage in the proceedings, the Review Officer is at risk of being manoeuvred into the uncomfortable position of being the "initial" arbiter of the critical decision that properly fell to be determined at first instance by the Standards Committee.

[95] But that said, Mr PR's opinion is not the final word on the issue. His opinion is precisely that, an opinion. It is a view formed not from the context of a broader consideration of the steps taken by the lawyers in the course of the litigation, but rather by narrow focus on the arguments advanced in the Tenancy Tribunal.

[96] Argument that the lawyers failed to competently advise ABC Ltd demands broader scrutiny than that which is provided by focusing primarily on an examination of the steps taken in the Tenancy Tribunal.

[97] Whilst Mr PR considered that the strategy adopted by the lawyers in the Tenancy Tribunal was "reasonable", his opinion does not (as he freely acknowledges) consider the broader scope of the advice offered in the course of the retainer.

[98] If Mr PR's opinion had been put to the Standards Committee (as I consider it should have been), the Committee would have had the opportunity to put to Mr PR (and the lawyers given opportunity to respond to) questions such as:

(a) should ABC Ltd have given firmer advice as to the consequences that could follow from a decision to remove the ducting; and

(b) would the approach adopted by the lawyers (focus on illegality) have likely been considered by lawyers experienced in unit title and body corporate matters, to have been reasonable; and

(c) were there remedies available to ABC Ltd that Mr PR considered should have been exercised in preference to the illegality argument?

[99] Mr PR provides an overview of his understanding as to how the Tenancy Tribunal approaches the hearing of unit title matters.

[100] His views are advanced from the context of him having argued a number of cases in the Tribunal.

[101] Mr PR's comments on the Tenancy Tribunal process considered in their totality (and I hope that I do not overstate his position) present a somewhat bleak view of his confidence in the Tenancy Tribunal to deliver principled and consistent decisions in unit title cases.

[102] It is his experience that:

(a) different adjudicators bring differences of approach to the hearing of unit title cases; and

(b) because of the broad and flexible manner in which the Tenancy Tribunal's jurisdiction may be exercised, there is an ability to argue points of law that may be less arguable in a more formal jurisdiction; and

(c) because of the flexibility accorded in the jurisdiction, it is difficult to argue that a party has made a procedural mistake; and

(d) the Tribunal will at times consider issues of fairness as well as law.

[103] To the extent that Mr PR's comments directly address the approach adopted by the Tribunal in this particular case (as opposed to his general views of the Tribunal process), Mr PR comments on the weight given (and not given) to specific evidence, and submits that the Tribunal had, whilst ostensibly "made its key findings based largely on points of statutory interpretation", approached the UTA "in an inconsistent way on different issues".

[104] It is Mr PR's contention that the decisions made by the lawyers in the Tribunal proceedings had to be considered from the context that the argument was being litigated in an informal Tribunal, where practice and procedures adopted by different adjudicators

varied, and in a context where there was greater fluidity around the decision making process.

[105] Mr PR does not go so far as to definitively state that he disagrees with the Tribunal decision, rather the thrust of his argument is that he considered (particularly considering the characteristics of the jurisdiction in which the argument was being litigated) that the arguments advanced by the lawyers were arguments that could reasonably be made. That argument is overarched with his contention that in unit title disputes, it is frequently the case that there is no “single right answer”.

[106] The jurisdictional foundation provided to the Tenancy Tribunal to determine unit title disputes, is provided by s 171 of the UTA.

[107] The Tribunal has jurisdiction to hear and determine all unit title disputes arising between any persons of the kind listed in s 171(2) of the UTA.

[108] The Tenancy Tribunal has been determining unit title disputes for a number of years.

[109] It could be expected that the adjudicators, who have been given responsibility for hearing unit title cases, will have acquired a degree of experience and expertise in the area.

[110] The Tribunal hearing proceeded over a considerable period of time.

[111] Abundant opportunity was provided to the parties to file submissions.

[112] The adjudicator took steps to join other parties to the proceedings.

[113] Having considered the steps taken, one is left with the impression that this was a case where the presiding adjudicator took particular care to ensure that both sides had ample opportunity to advance their positions.

[114] I do not consider that the decision issued by the Tenancy Tribunal gives indication of a decision being reached by reference to or reliance on the adjudicator’s assessment as to the “fairness” of the arguments, but rather a decision arrived at following the adjudicator’s considered attention to the pivotal questions as to whether the ducting constituted infrastructure for purposes of the UTA, and whether the ducting had been installed illegally with consequence that the body corporate had no obligation to maintain it.

[115] Whilst the Tribunal must exercise its jurisdiction in a manner that requires it to "consider fairness as well as law" (s 85 of the Residential Tenancies Act 1986), s 85 does not allow opportunity for adjudicators to ignore the law and determine cases on their perception as to what is "fair".

[116] In *Ziki Investments (Properties) Ltd v McDonald*, the High Court had this to say about s 85:[6]

> [69] Section 85(2) states specifically that each dispute shall be determined "according to the general principles of law relating to the matter". Significantly, the reference to determining in accordance with the substantial merits and justice comes after the reference to determining the dispute according to the general principles of law. The overarching application of those general principles is not undermined by the provision that the Tribunal is not bound to give effect to strict legal rights or obligations or to legal forms or technicalities. This simply means that technical requirements, such as matters of form or time, may not be strictly applied. In this the subsection indicates that general principles of law should be interpreted or applied consistently with the merits and justice of the case where possible.
>
> [70] Section 85(2) must also be read with s 85(1), which provides that the Tribunal should exercise its jurisdiction in a manner that is most likely to ensure the fair and expeditious resolution of disputes. Section 85(2) does not therefore give the Tribunal a carte blanche to decide the case on its perception of merits and justice. However, it can be an aid to interpretation. …

[117] In the absence of steps being taken to appeal the decision, the Tribunal decision stands as the final word on the issues considered by the Tribunal.

[118] Whilst the lawyers may be somewhat dismissive of the stature of the Tribunal, and Mr PR may have considered that the Tribunal had been somewhat inconsistent in its approach, the appropriate vehicle to litigate concerns with the decision was by way of appeal to the District Court.

[119] It is not open to a Standards Committee, or to the LCRO, to substitute their views for the findings of the Tribunal.

[120] I do not consider that Mr PR's opinion should be accepted in evidence.

[121] In reaching that view, I pay particular account to the fact that:

(a) it could reasonably have been expected of the lawyers that evidence of this nature would have been provided to the Standards Committee;

(b) the limitations of the opinion; and

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[6] *Ziki Investments (Properties) Ltd v McDonald* [2008] 3 NZLR 417 (HC).

(c) the lawyers' expression of confidence in the arguments they had advanced to the Standards Committee.

Was the Committee's investigation marred by procedural irregularities?

[122] Mr OX submitted that the Standards Committee had failed to deal with the conduct investigation in a procedurally fair manner.

[123] It was Mr OX' contention that the issues engaged by the review could not be given proper consideration by a Committee electing to deal with the matter on the papers. It was his view that the complaints raised were more appropriately addressed in civil proceedings brought in negligence.[7] He considered that matters traversed by the complaint were more appropriately heard in the District Court.

[124] He submitted that the Committee should have determined that the investigation proceed as a formal hearing with the parties in attendance. He was critical of the fact the lawyers had not had opportunity to cross examine Ms HY. He considered that the issues raised by the complaint inevitably made demand of the Committee to make credibility findings, and that it was unsound for the Committee to attempt to do so in circumstances where the hearing was held on the papers.

[125] Mr OX considered that the process adopted by the Committee was so inherently flawed, that it was incapable of being remedied. He was critical of the reasons provided by the Committee to support its conclusions. He considered the reasons that had been provided to be woefully inadequate.

[126] Amongst the functions of a Standards Committee, is the obligation to inquire into and investigate complaints made under s 132 of the Act.

[127] On receipt of a complaint, a Committee may exercise one of three options,[8] those being to:

(a) inquire into the complaint; or

(b) direct that the parties explore possibility of resolving by negotiation, conciliation or mediation; or

(c) elect to take no further action on the complaint.

[7] The negligence argument will be separately addressed later in the decision.
[8] Lawyers and Conveyancers Act 2006, s 137.

[128] If a Standards Committee determines to inquire into a complaint, it is required to send particulars of the complaint or matter to the person to whom the complaint or enquiry relates, and to invite that person to make a written explanation in relation to the complaint or matter.[9]

[129] The Committee may require the person complained against to appear before it to make any explanation in relation to the complaint or matter.[10]

[130] A Standards Committee may, after inquiring into a complaint and conducting a hearing with regard to that complaint, make a determination that there has been unsatisfactory conduct on the part of a practitioner.[11]

[131] The default position for hearings conducted under s 152(1), is for the hearings to be conducted on the papers, "unless the Standards Committee otherwise directs".[12]

[132] A Standards Committee must exercise and perform its duties, powers and functions in a way that is consistent with the rules of natural justice.[13]

[133] Subject to the Act, and to any rules made under the Act, a Standards Committee may regulate its procedure in such manner as it thinks fit.[14]

[134] It is a rare for a Standards Committee to make direction that a party appear before it in person. In the many hundreds of Standards Committee decisions that I have read in the course of conducting review hearings, I am unable to recall a single Committee decision where the Committee has heard from a party in person.

[135] The fact that it is rare for a Committee to hear directly from a party does not in itself provide full response to Mr OX's argument that it should have done so in this case, but it is reasonable to examine whether there were any circumstances that would necessitate the Committee departing from its established practice of conducting hearings on the papers.

[136] Mr OX argues that the nature of the issues engaged by the complaints, demanded that the parties be heard in person.

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[9] Lawyers and Conveyancers Act 2006, s 141(a).
[10] Lawyers and Conveyancers Act 2006, s 141(b).
[11] Lawyers and Conveyancers Act 2006, s 152(1).
[12] Lawyers and Conveyancers Act 2006, s 153(1).
[13] Lawyers and Conveyancers Act 2006, s 142(1).
[14] Lawyers and Conveyancers Act 2006, s 142(3).

[137] It is his contention that the issues were complex, and required the Committee to make credibility findings that could only be made if the Committee had opportunity to hear directly from the parties.

[138] Whilst I agree that the issues engaged a degree of complexity, I am not persuaded that the issues were so complex that the Committee could not determine the matter on the papers.

[139] Nor am I persuaded that credibility findings were critical to the Committee's determination of the issues.

[140] It was Mr OX's contention that Ms HY should have been required to attend the hearing so that she could be questioned on the issue as to the extent that her instructions had had influence on directing the focus of the litigation.

[141] Response to that concern was met by Ms HY's lawyer with argument that irrespective of the instructions a client may provide their lawyer, a lawyer has a duty to provide the client with competent and forthright advice which reflects the lawyer's view of the factual/legal issues engaged by the dispute. It is not the role of a lawyer to pander to their client, and tailor advice to accommodate the client's particular view.

[142] I think it unlikely that the Committee would have been demonstrably assisted by availing itself of opportunity to hear from either of the parties.

[143] Credibility issues were not at the heart of the complaints. The adequacy of the advice provided was.

[144] It was the task of the Committee to assess the adequacy of the advice proffered, by reference to the factual matrix, and the legal issues.

[145] In any event, the nature of the instructions received, and advice proffered should, in a matter such as this, be readily ascertainable from the information on the lawyer's file.

[146] Considering the nature of the issues involved, it could reasonably be expected of a competent and diligent lawyer that, if the lawyer's client was insisting on a course of action which the lawyer considered had possibility of resulting in a seriously adverse outcome for the client, that there would be correspondence and file notes recording:

(a) the lawyer's concerns regarding the approach proposed by the client; and

(b) specific advice to the client identifying potential risks; and

(c) an assessment of the potential risks in becoming embroiled in litigation; and

(d) advice to the client (if litigation was to proceed) of potential exposure to costs.

[147] Counsel for the lawyers overarched their argument that the Committee had erred in dealing with the complaint on the papers, with argument that the process adopted by the Committee constituted a breach of natural justice.

[148] If argument is advanced that a decision maker has breached their obligation to ensure that a conduct investigation is conducted with proper attention to natural justice principles, it is important for the party alleging such shortcomings to particularise and clarify precisely how the decision maker has fallen short.

[149] I do not propose to attempt expansive description of what is required of a Committee to ensure it complies with its obligation to exercise and perform its duties and powers in a way that is consistent with the rules of natural justice, except to note that it would properly be expected of a Committee that:

(a) the lawyers be provided with a copy of the complaint; and

(b) the lawyers be provided with opportunity to respond to the complaint; and

(c) the lawyers be alerted to the specific issues that the Committee considered relevant to the conduct enquiry; and

(d) that the members of the Committee charged with conducting the investigation brought to their inquiry the necessary degree of distance and independence that ensured that there could be no suggestion of the Committee being improperly influenced.

[150] It has been observed that it is not useful to propound any minimum standards that might apply (natural justice) uniformly in complaints proceedings. The obligations on a decision maker will depend on the facts and circumstances and the context in which they arise.[15]

[151] A perusal of the Standards Committee file indicates that:

(a) Mr GS and [LAW FIRM A] were initially directly provided with a copy of ABC Ltd's complaint by Ms HY's lawyer (19 September 2019); and

[15] *Birss v secretary for Justice* (1984) 1 NZLR 513 (CA) at p 516.

(b) the lawyers provided response to the complaint (4 October 2019); and

(c) the Complaints Service provided the lawyers with a copy of the complaint (23 January 2020) and invited a response; and

(d) the lawyers provided a comprehensive (28 page) response to the complaint (11 March 2020); and

(e) Mr SW was informed the Committee resolved to commence an own-motion investigation into his conduct in the complaint.

(f) the Standards Committee provided the parties (9 November 2020) with a notice of hearing detailing the conduct issues under consideration and invited submissions from the parties; and

(g) the lawyers provided a comprehensive (34 page) response to the notice of hearing (30 November 2020).

[152] The Standards Committee file provided to the LCRO, comprised some 1,469 pages.

[153] I do not consider it likely that the Committee's appreciation and understanding of the issues would have been significantly enhanced by taking steps to hear directly from the parties.

[154] Having examined the process followed by the Committee in managing its conduct investigation, I am not persuaded the Committee breached its obligations to ensure that its conduct investigation was conducted with proper regard to natural justice principles.

Were the issues raised by the complaints matters that should more appropriately have been addressed in an action brought in negligence, rather than through the vehicle of a professional conduct complaint?

[155] It is contended for the lawyers that the issues engaged by the conduct complaints were more properly addressed in proceedings brought in negligence.

[156] Negligence is a cause of action in tort that is well-understood by traditional civil courts. Its ingredients include a duty of care, a breach of that duty, and a measurable loss that has been caused by the breach of duty. Findings of negligence may only be arrived at after comprehensive — sometimes expert — evidence has been given. Issues that often arise in claims of negligence include whether a person has breached their duty

of care, or whether there is a connection between the alleged loss and the breach of duty. Complex arguments often arise about whether any loss has been suffered.

[157] In terms of the lawyer's disciplinary regime, a finding of unsatisfactory conduct may be reached where a lawyer engages in conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[16] Unsatisfactory conduct may also be established where conduct contravenes the Act, or any regulation or practice rule made under the Act, which must include r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.[17] A charge of misconduct is available when such a contravention is wilful or reckless,[18] and negligence or incompetence in a professional capacity may form the basis of a charge in the Lawyers and Conveyancers Disciplinary Tribunal where the conduct is of such a degree, or so frequent, as to reflect on the practitioner's fitness to practice or tends to bring the profession into disrepute.[19]

[158] It is not the case that every act of negligence will be such as to warrant a finding of unsatisfactory conduct.[20]

[159] It was submitted for Mr SW that the disciplinary investigation was "not a substitute for civil proceedings", and that the concerns raised by ABC Ltd "ought to have been heard in the District Court".

[160] In support of this argument, the lawyers drew attention to previous decisions of the LCRO in which Review Officers had concluded that the matters engaged by the particular complaint/review were more appropriately addressed in a claim brought in negligence, rather than through the vehicle of a disciplinary inquiry.

[161] When advancing argument that matters raised as issues of professional conduct are not appropriately addressed through the process of a conduct investigation, adequate reasons must be advanced to support argument that it would be inappropriate for the issues traversed by the conduct complaint to be investigated through the vehicle of a professional conduct inquiry.

[162] It is approaching the trite to emphasise that starting point is that Ms HY, through the vehicle of her company ABC Ltd, engaged [LAW FIRM A] to represent her.

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[16] Lawyers and Conveyancers Act 2006, s 12(a).
[17] Lawyers and Conveyancers Act 2006, s 12(c).
[18] Lawyers and Conveyancers Act 2006, s 7(1)(ii).
[19] Lawyers and Conveyancers Act 2006, s 241(c).
[20] *Ragg v Legal Complaints Review Officer* [2021] NZCA 579.

[163] ABC Ltd were dissatisfied with the representation provided. The company elected, as it was entitled to do, to pursue a complaint against the lawyers the company had instructed.

[164] The appropriate forum at first step for ABC Ltd to advance its concerns, was through the complaints process established under the Lawyers and Conveyancers Act 2006.

[165] Legislation governing the discipline of lawyers in New Zealand has consumer protection as one of its principal objects.

[166] The complaints process is intended to provide opportunity for “any person” to bring a complaint to the Complaints Service concerning the conduct of a practitioner or former practitioner.

[167] The complaint advanced by ABC Ltd presents as “typical” of the type of complaint that is frequently brought to the door of the Complaints Service.

[168] Ms HY complains that she was poorly advised, and that she had incurred significant legal fees for work that was of no value to her.

[169] The complaints present as entirely conventional.

[170] What then, in the circumstances of this particular case, could justify either a Committee or LCRO reaching conclusion that Ms HY and ABC Ltd should be denied opportunity to have concerns about the conduct of their lawyers addressed in the jurisdiction that is specifically charged with responsibility to investigate complaints about lawyers?

[171] The lawyers’ response was to argue that a Standards Committee is not properly equipped to make proper assessment as to whether the litigation strategy adopted by the lawyers in this particular case was appropriate, as the efficacy or otherwise of that strategy can only properly be examined in a jurisdiction where opportunity is provided for witnesses to be called, for those witnesses to be cross examined, for expert evidence to be given, and opportunity provided for a more comprehensive examination of the steps taken by the lawyers to be undertaken.

[172] I am not persuaded that the issues raised by ABC Ltd’s complaint were of such complexity that an assessment as to whether the lawyers had competently advised their client could only be undertaken by advancing civil proceedings in the District Court.

[173] It is pertinent to note that Standards Committees are made up of practising lawyers, familiar with the practice of law including the conduct of litigation in the courts, as well as lawyers' duties and obligations and the pressures under which lawyers often find themselves. Standards Committees must also include a lay member. This format allows for a range of views – legal and non-legal – to be considered. The process is flexible and robust.

[174] Experienced Committee members are generally well-positioned by virtue of their training and experience to bring a measured judgement to consideration of the question as to whether a lawyer has breached their obligations to represent a client competently.

[175] Standards Committees will generally include amongst its members, lawyers who have considerable litigation experience, and lawyers experienced in conveyancing matters.

[176] It would be expected of experienced conveyancers that they would be familiar with the legal issues that arise with unit titles (particularly the transactional procedures involved in the conveyancing of unit title properties) and that the experienced litigators on the Committee would understand the fundamentals of managing a litigation case, particularly:

(a) the need to ensure that the litigation issues were correctly identified; and

(b) that a reasonable and responsible defence was available to their client in circumstances where the client was required to respond to proceedings that had been filed; and

(c) the need to ensure that a lawyer's client was kept fully informed throughout the course of the litigation as to the risk and cost factors.

[177] That said, it is inevitably the case, considering the breadth of issues traversed by the variety of complaints that are managed by Standards Committees, that on occasions the subject matter engaged by the complaint will involve areas of law that a number of Committee members may not have a particular experience in.

[178] But the fact that a particular complaint may present as challenging does not mean that a Standards Committee should step back from or avoid its obligations to consider the complaint.

[179] Decision makers in all jurisdictions inevitably, on occasions, confront cases that are challenging.

[180] The Standards Committee's task was to bring its collective wisdom to an examination of the question as to whether the advice provided by the lawyers to their client, presented as competent.

[181] In undertaking that analysis, the Standards Committee had the benefit of comprehensive submission from both parties, and a decision from a Tribunal that had directly addressed a number of the issues that were pivotal to ABC Ltd's complaint.

[182] Whilst the litigating of unit title disputes can be challenging, I am not persuaded that the issues engaged in this particular dispute were so complex or difficult, that it would have fallen outside the scope of the experience of the Standards Committee to bring their expertise to a determination of the question as to whether the lawyers had provided their client with competent advice.

Did the lawyers provide competent advice to their client?

The approach to examining competency

[183] In the course of providing regulated services to their client, a lawyer must act competently, and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.[21]

[184] A lawyer's conduct may be deemed to be unsatisfactory if, in the course of providing regulated services to their client, their conduct falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.[22]

[185] The duty to act competently has been described as "the most fundamental of a lawyer's duties" in the absence of which "a lawyer's work might be more hindrance than help".[23]

[186] The standard of competence is an objective one. The question is whether the lawyer under scrutiny applied the care or skill that any reasonable lawyer in the same position would have done.[24]

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[21] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 3.
[22] Lawyers and Conveyancers Act 2006, s 12(a).
[23] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington 2016) at [11.1].
[24] At [11.3].

[187] It has been noted that lawyer competence, though pivotal to public confidence in the profession and the administration of justice, lacks any generally accepted meaning; it instead takes its flavour from the perspective of the observer.[25]

[188] Not surprisingly, neither the Act, nor the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), attempt to lay down a definitive definition of competence, a determination of which must inevitably be attempted through an examination of a variety of factors including, but not limited to, the nature of the retainer and the context in which the conduct complaint arises.

[189] It is important to recognise that an obligation to provide competent advice does not impose unreasonable burden on a practitioner to be always right, or to always provide the right advice.

[190] It has been noted that:[26]

> While there is an existing professional duty of competence in New Zealand, albeit one which is particularly narrow, there is no duty to provide a high level of service to clients. The duty of competence is, in reality, a duty not to be incompetent and is aimed at ensuring minimum standards of service.

[191] What may on first reading present as a singularly less aspirational objective for a profession than would be expected is, on closer examination, an affirmation of a reasonable standard of expectation of the level of competency required of lawyers. All lawyers are expected to provide a competent level of service to their clients.

[192] A broad and useful expression of the indicia to be considered in determining competency was attempted by the American Bar Association in a discussion document where it said:[27]

> Legal competence is measured by the extent to which an attorney (1) is specifically *knowledgeable* about the fields of law in which he or she practises, (2) performs the techniques of such practice with *skill*, (3) manages such practices *efficiently*, (4) identifies issues beyond his or her competence relevant to the matter undertaken, bringing these to the client's attention, (5) *properly* prepares and carries through the matter undertaken, and (6) is intellectually, emotionally, and physically *capable*. Legal incompetence is measured by the extent to which an attorney fails to maintain these qualities.

[193] The dispute required (as is commonly the case with all disputes) the lawyers to approach the problem not just with a carefully researched examination of the legal issues

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[25] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [4.24].
[26] Webb, Dalziel and Cook, above n 23 at [11.3].
[27] American Bar Association and American Law Institute *Committee on Continuing Professional Education Model Peer Review System* (discussion document, 15 April 1980).

involved, but also with the necessary recognition of the need to achieve a practical and possibly pragmatic outcome.

[194] When assessing the question as to whether a lawyer has fallen short in their obligation to competently advise their client, that assessment is not undertaken from the starting point that the lawyer, in providing advice, must always be right, or from the standpoint of unrealistic expectation that a lawyer must be infallible and incapable of making a mistake.

[195] Conduct issues do not inevitably arise because a particular litigation strategy advanced by a lawyer has been unsuccessful.

[196] In *LCRO 262/2014* the Review Officer noted that:

> [116] Although there are rules of engagement for litigation, such as procedural and evidential rules, as well as the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules)), the conduct of litigation is largely an inexact science driven by tactical and strategic decisions made by the opposing parties.
>
> [117] One lawyer's view of the most effective strategy to conduct litigation may be diametrically opposed to another lawyer's view and, absent incompetence, it is not always possible to determine which view is the better.
>
> [118] Again, absent incompetence, tactical and strategic advice given by lawyers to their clients will be informed by that lawyer's experience as well as their assessment of the other party's position. It is, in many respects, a battle of wits and wills.

[197] It has also been noted that a lawyer "is not bound … to exercise extraordinary foresight, learning or vigilance".[28]

[198] Nor is it the case that judgements made by lawyers in the course of their complex work are professionally culpable only because they prove ultimately to have been wrong by the measure of a judgment of a court or tribunal. Such a proposition would result in the paralysis of the legal system, where every lawyer acting in uncertain litigation or in a disputed or complex transaction or application would be vulnerable to professional discipline. The point is well made in the text *Ethics, Professional Responsibility and the Lawyer*:[29]

> Being competent does not, in professional practice preclude the making of mistakes. Because law is not a science, practitioners sometimes err in their judgments. Lawyers do not guarantee the outcome of their work. It is conceivable that in hindsight it could be shown the course of action the lawyer proposed or the lawyer's interpretation of the law was demonstrably wrong.

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[28] *Jennings v Zilahi-Kiss* (1972) 2 SASR 493 (SC) at p 512, cited with approval in Dal Pont, above n 25.

[29] Webb, Dalziel and Cook, above n 23 at [11.4.1].

> However, when the error is in the exercise of judgment or the interpretation of an uncertain, unclear, or complex provision, a lawyer cannot be said to be incompetent.

[199] It is clear then, that a Standards Committee considering complaint that a lawyer has failed to act competently in guiding their client in the course of litigation, must undertake that analysis with clear understanding that different lawyers may adopt different approaches and that a failure to achieve desired outcomes does not automatically translate to argument that the lawyer has failed to act competently.

The factors that persuaded the Committee that there had been a failure to act competently

[200] What then persuaded the Committee that the lawyers could not inoculate themselves from a finding that their conduct had been unsatisfactory, by recourse to argument that the steps taken in the litigation were reasonably open to the lawyers to take?

[201] The Committee concluded that the lawyers had failed to meet the required standards of competence and diligence on the basis of its findings that the lawyers:

(a) in several instances "simply did not get the law right"; and

(b) proceeded with the "self-help" remedy of having the ducting removed; and

(c) defended the Tenancy Tribunal proceedings solely on the basis of the illegality argument; and

(d) failed to sufficiently challenge their client's decision to remove the ducting; and

(e) achieved a poor outcome for their client, particularly in exposing their client to a substantial Tenancy Tribunal costs order.

[202] Having given careful consideration to all the material, I find myself in agreement with the Committee that there were aspects of the lawyers' representation which provided reasonable foundation for its conclusion that the lawyers had breached their obligation to act competently, but I arrive at that view by travelling a different path to that of the Standards Committee.

[203] In doing so, I recognise the degree of caution that must be exercised by a Review Officer when addressing complaint that a lawyer has failed to act competently in the course of conducting litigation.

[204] The Committee concluded, from its scrutiny of the work that had been undertaken, that virtually nothing of value had been achieved for the client.

[205] Evidence of the Committee's view, that work undertaken had been essentially worthless, is reflected in the approach adopted by the Committee when examining the reasonableness of the fees charged by the lawyers.

[206] The Committee concluded that "nothing the firm did was ultimately of any value to the client".[30]

[207] Consequential on that finding, the Committee considered it unnecessary to undertake an assessment of the fees charged by reference to the individual invoices — rather, it concluded that the only fair and reasonable fee was "no fee".

[208] This presents as a scathing indictment of the lawyers' conduct. It is argument that, from start to finish, the lawyers did nothing of any value for their client.

[209] With respect to the Committee, I do not agree that none of the work undertaken had value for the client.

[210] Nor do I agree with the Committee that the lawyers defended the Tribunal proceedings solely on the basis of advancing the illegality argument, although that argument was clearly to the forefront.

[211] The Committee's approach to its assessment of the value of the work undertaken:

(a) failed to give sufficient attention to the preliminary work that had to be undertaken by the lawyers on first receiving instructions; and

(b) failed to give sufficient attention to the reasonable steps taken by the lawyers to try and achieve the outcome sought by their client; and

(c) failed to give adequate consideration to the obstacles faced by the lawyers, the complexity of the issues, the competing interests, and the unwillingness of parties who had an interest in, and a responsibility to, resolve the problem with the ducting, to cooperate in assisting with seeking a solution to the problem; and

[30] Standards Committee decision (3 June 2021) at [67].

(d) failed to pay sufficient regard to the extent to which the lawyers' initial approach to the litigation was influenced by the instructions received from their client.

[212] Whilst I consider that there were aspects of the lawyers' representation which fairly require consideration as to whether their conduct fell short of their obligation to provide Ms HY with competent representation, I am not persuaded that all of the work undertaken was unnecessary or unhelpful.

Initial steps taken by the lawyers – the neighbouring units, the building manager, the body corporate administration company

[213] The complaint advanced for Ms HY was comprehensive. It identified no fewer than eight specific errors that were said to have been made by the lawyers. But underpinning that raft of criticism was allegation that the lawyers had failed to identify the appropriate legal remedies available and committed Ms HY to advancing a legal strategy that was misconceived and ultimately extremely costly for her.

[214] Criticism was made of the lawyers that they had mistakenly advised ABC Ltd at commencement to seek remedy from the developer.

[215] It was argued for Ms HY that this advice was misdirected as the sale and purchase agreement specifically provided opportunity to the developer to add to the plans.

[216] That may have been the case. But an ability to install the ducting did not absolve the developer from its obligation to ensure quality of the workmanship, and that the ducting was fit for purpose.

[217] The defects in the ventilation system installed were manifest and obvious. The omission of cooking odours and contaminated air impacted directly on neighbouring units.

[218] Prior to seeking advice from [LAW FIRM B], Ms HY had endeavoured to resolve the problems directly with the developer. She had also taken legal advice on the issue before consulting [LAW FIRM B]. The lawyer initially instructed by Ms HY had advised Ms HY that she should direct her concerns to the developer.

[219] Ms HY's initial discussions with the developer had given her confidence that the developer would take responsibility for the problems with the ventilation system.

[220] The developer assigned a staff member to deal directly with Ms HY. It is clear from correspondence Ms HY forwarded to the developer in April 2017, that she believed that the developer had provided assurances that it would address the concerns she had raised.

[221] On 17 July 2017, the lawyers wrote to the developer making demand for the ducting to be removed.

[222] The decision by the lawyers to target the developers was an approach that could not reasonably be criticised as evidencing a failure on the part of the lawyers to competently advise their client.

[223] It is commonplace in circumstances such as these, where there is uncertainty as to who is to bear responsibility for a defect in a building, for lawyers to identify all potentially liable parties, and to seek redress from all.

[224] With the acuity of hindsight, it is contended for Ms HY that the lawyers should have recognised immediately that there were fundamental defects with the ducting in that the air being emitted had not, as was required, been cleared of contaminants. The solution, it is argued for Ms HY, was to have scrubbers installed to ensure that contaminants were removed.

[225] But the body corporate had been aware of the problem and the option available to remedy the problem (installation of scrubbers) early in the piece, but had failed to take steps.

[226] The question was, who would take responsibility for remedying the problem?

[227] Nor is it clear that Ms HY would initially have been receptive to any solution other than one which resulted in the complete removal of the ducting from her unit.

[228] Argument that the lawyers were resolutely inflexible in holding steadfast to argument that the ducting did not constitute infrastructure to the exclusion of other available arguments has merit (and this will be addressed later in the decision) but it is important to note that the body corporate gave little indication of a willingness to work with Ms HY, and took steps to distance themselves from the problem.

[229] It was the lawyers' contention that Ms HY had throughout been reluctant to engage the body corporate in the dispute.

[230] I am uncertain as to why Ms HY would have had reservations about engaging with the body corporate, and there is no indication on what is a very comprehensive

Standards Committee file, of any correspondence, file notes, or evidence of instructions received or advice given, to support suggestion that Ms HY was reluctant to engage with the body corporate.

[231] If it was the case that Ms HY was reluctant to involve the body corporate, that hesitation was short lived. In correspondence to the body corporate's management company on 20 September 2017, the lawyers noted that Ms HY had been directly talking with the body corporate about proposals to have the ducting diverted, with intention that the developer cover the costs.

[232] The developer responded to request to remedy the problem by referring the lawyers to the onsite building and rental manager.

[233] On 10 July 2018, the building manager advised the lawyers that they should direct their concerns to the developers, as the problem arose from a "design discrepancy".

[234] The body corporate continued to exhibit a similar lack of interest in becoming involved.

[235] In correspondence to the lawyers on 11 July 2018, the body corporate's management company advised the lawyers that they should "deal directly with the owners".

[236] In further correspondence of 11 July 2018, the management company advised the lawyers that "when the unit was purchased your client should have ascertained that the duct was in the unit. If your client was not happy your (*sic*) should have contacted the developer directly and followed up. The ventilation systems were installed by the developer and not by the body corporate. I would suggest if your client or you on behalf of the client to right (*sic*) to the developer. We have spoken to the developer in the past and they should be aware of this".

[237] Ms HY was not alone in having her attempts to have the body corporate take an interest in the problem rebuffed.

[238] Later in the proceedings, the lawyers became aware that the tenant of a unit adjoining that of Ms HY's had alerted the body corporate to problems with the venting system as early as April/May 2017. The tenant had made what were described as "rigorous efforts" to have the body corporate fix the problem.

[239] The body corporate was put on notice that the unit owner considered the body corporate to be in breach of its obligations to repair and maintain the building's infrastructure.

[240] The lawyers also took steps to have the adjacent unit owner/occupiers accept responsibility for the ventilation problems.

[241] On 9 August 2017, the lawyers wrote to the owners of the adjoining units making demand of the owners to cease the cooking activities that were causing Ms HY problems. The unit owners were advised that the contaminated emissions were interfering with their client's right to enjoyment of her premises. This correspondence was copied to the body corporate.

[242] It is a common feature of unit title disputes where there is argument over liability for remediation work, for there to be significant contest over the question as to who bears responsibility for costs likely to be incurred. It is not uncommon for there to be disagreement as to the extent to which parties' obligations are defined by the UTA.

[243] The lawyers' attempts to seek remedy from the developer, unit owners and, to a limited degree, the body corporate, presented as steps that were reasonable for the lawyers to have initially taken. Many lawyers faced with similar circumstances would have considered it prudent and responsible to have taken those steps.

[244] I do not consider that the lawyers were, when first instructed, confronted with a problem which presented as capable of being resolved by recourse to a single remedy of such obviousness, that a failure on the part of the lawyers to recognise the possible solution presented as an error of such consequence as to expose the lawyers to criticism that they had fallen significantly short in their obligation to competently advise their client.

The client's instructions

[245] It is also important to examine the steps initially taken by the lawyers through the prism of the instructions provided by their client.

[246] It was submitted by the lawyers that Ms HY was a competent and capable client, who had considerable experience in property matters. Ms HY was said by the lawyers to be a person capable of providing clear and forthright instructions, and that she had made it clear throughout that the only outcome she would be satisfied with was for the ducting to be completely removed from her unit.

[247] I agree with the Committee that it fell to the lawyers to provide Ms HY with robust advice and that, irrespective as to whether Ms HY was strongly committed to removing

the ducting, the lawyers had a clear duty to ensure that she was informed of the risks involved.

[248] But I think it unreasonable to entirely discount the extent to which Ms HY's initial instructions may have had a degree of influence in shaping the lawyers' approach.

[249] Whilst it is the case that a lawyer is required to challenge their client if the lawyer considers that the steps the client is determined to take are steps best not taken, a lawyer is required to follow their client's instructions. This may involve the lawyer advancing a particular strategy that attracts a greater the degree of risk, but if successful, achieves the desired outcome for the lawyer's client.

[250] I think it probable that Ms HY's advice to the lawyers at commencement, was robust and firm in requiring a solution that involved the complete removal of the ducting from her unit.

The lawyers' advice as to potential consequences of removing the ducting

[251] In September 2017, Ms HY wrote to the lawyers seeking an update on progress.

[252] The lawyers responded to Ms HY with indication that the neighbouring unit's owners/occupiers had taken no steps.

[253] Mr GS suggested to Ms HY that she had three options, either:

(a) remove the ducts and block the ducts from entering the premises; or

(b) sue the owners/occupants of the neighbouring units; or

(c) do nothing.

[254] In addressing possible risk, Mr GS observed that there would be some financial cost, and noted possibility that the neighbouring owner/occupiers "may or may not take action against you".

[255] On 4 October 2017, the lawyers provided Ms HY with a comprehensive opinion. That opinion was provided in response to instructions received from ABC Ltd on 25 September 2017, those instructions being to "conduct legal research into the two ventilation ducts".

[256] The lawyers had been instructed in April 2017. Absent any success in achieving outcome through negotiation with the developer or unit owner/occupiers, and having been given no indication that the body corporate was prepared or willing to become

involved, Ms HY was, by September 2017, clearly seeking a more comprehensive roadmap for the path forward.

[257] Mr GS concluded, based on his view that the property owners required protection of an easement if they were to enjoy the benefit of air and light access, that ABC Ltd had no obligation to "preserve" the ducting.

[258] Mr GS examined the steps taken by the developer.

[259] He assessed the potential culpability of the adjacent unit owners/occupiers, and considered the scope of a clause in the body corporate rules which imposed obligations on unit owners to refrain from carrying out or permitting any conduct which would be likely to interfere with the use and enjoyment of the unit title development by other owners.

[260] Mr GS advised Ms HY that the Tenancy Tribunal was authorised to hear unit title disputes and informed her that the Tribunal may make orders directing unit owners or the body corporate to do anything necessary to remedy a breach of the body corporate rules or obligations arising under the Act, or to refrain from doing anything which would breach those rules or obligations.

[261] Mr GS advised Ms HY of the options available to her to pursue a claim in nuisance against the owners of the adjacent units. He details the factors that have to be established when advancing an argument in nuisance and references those factors to the particular breaches. He provides an assessment as to how the unit owners could potentially respond to claims brought against them.

[262] Mr GS's opinion was comprehensive.

[263] It would be difficult to make criticism that Mr GS had failed to meet his obligations to Ms HY to provide her with a comprehensive overview of the issues.

[264] The sharp point of any legal opinion is the recommendations made by the lawyer for advancing their client's case.

[265] Mr GS concluded that:

(a) ABC Ltd had no obligation to preserve the ducting; and

(b) as a consequence, it was open to ABC Ltd to sue the adjacent unit owners/occupiers; and

(c) alternatively, ABC Ltd could remove the ducting and then take steps to recover removal costs together with damages.

[266] It is difficult to see that advice framed in this fashion would have left Ms HY with anything but a considerable confidence in the belief that she had no obligations in respect of the ducting, and a firm conviction that steps taken to remove the ducting would carry little risk of adverse consequence for her.

[267] This was advice that was to shape the future of the retainer and advice that ultimately led to complaint that the lawyers had breached their obligation to competently advise their client.

[268] The criticism that I consider can be fairly made of Mr GS's opinion is that he failed to sufficiently identify the extent of the risks to which Ms HY could be potentially exposed if she was to remove the ducting.

[269] Irrespective as to the extent of Ms HY's determination to have the unsightly and ineffective ducting removed from her unit, it was incumbent on the lawyers to ensure that Ms HY was adequately warned of the risks.

[270] Many lawyers would, in my view, have serious reservations about advising a client to take steps to interfere with ducting systems in a body corporate managed complex, when it was apparent that interference with the ventilation system could carry risk of causing disturbance to other unit owners and have potential to impact common property.

[271] The lawyers suggested that there had been discussions with Ms HY in which they had addressed the potential risks of her pursuing the self-help remedy. I am unable to locate any evidence of correspondence on the Standards Committee file, of the lawyers setting out in writing, as I consider they were required to do, a careful explanation of the difficulties that Ms HY could face, if she proceeded to remove the ducting.

[272] Advising Ms HY that it was open to her to remove the ducting was advice that carried possibility of significant consequences for Ms HY, but there is little evidence that the scope of her potential exposure was adequately discussed with her.

[273] From the time the lawyers provided initial advice to Ms HY that she could proceed to remove the ducting, the lawyers remained steadfast in their view that she was entitled to do so.

[274] Their confidence in that position is reflected in their robust demand of the body corporate that it refrain from taking steps to reinstate the ducting, and their commitment to defending the proceedings brought by the body corporate in the Tenancy Tribunal.

[275] Mr GS's advice to Ms HY that steps taken to remove the ducting would be analogous to a neighbour cutting back overhanging branches on a boundary, was advice that fell demonstrably short of sufficiently informing Ms HY as to the potential consequences that could arise.

[276] In his earlier correspondence in September 2017, Mr GS had similarly paid little attention to clarifying the extent of the possible consequences that could result from a decision to remove the ducting. At that time, Mr GS observed that the neighbouring owners/occupiers "may or may not take action against you".

[277] A more comprehensive assessment of risk factors was required then simple reference to possibility of Ms HY being sued. Much more was demanded.

[278] The lawyers' obligation to advise Ms HY as to the scope of her potential exposure, was obligation that could not be met by simple indication that Ms HY could face possibility of being sued.

[279] Threat of potential litigation would be concerning for most clients. Indication of litigation risk could reasonably have been expected to have been accompanied by:

(a) an indication of the nature of the proceedings that could be filed; and

(b) advice as to the forum in which the dispute would be litigated; and

(c) advice on process, i.e. how the litigation, if commenced, would proceed and be responded to; and

(d) an informed explanation as to potential costs.

[280] The consequences of the recommendations made must be assessed by reference to what followed. That assessment must not become untethered from argument that it is not expected of a lawyer that they be always right.

[281] Following receipt of Mr GS's opinion, Ms HY stepped back from the matter for a period of time.

[282] In February 2018, Mr GS forwarded a brief note to Ms HY making general enquiry as to how her shop was faring.

[283] It is uncertain as to whether this inquiry prompted Ms HY to decide to take up the cudgels again, but shortly thereafter in early March 2018, Mr GS was providing instructions to a contractor to remove the ducting in Ms HY's unit.

[284] Mr GS's correspondence with the contractor initially instructed does not simply provide details of the work to be undertaken, but in addition informs the contractor of the background to the dispute, and advises the contractor of Mr GS's view of the legal position.

[285] It presents as unusual that advice to a contractor would be accompanied by an account of the historical background to a dispute, and the lawyer's opinion of the legal issues engaged by the dispute. It is clear from Mr GS's correspondence that he anticipates possibility of the contractor becoming embroiled in an argument with Ms HY's neighbours. Mr GS advises the contractor that his client would be "willing to compensate the contractor for any civil liabilities arising from it carrying out ABC Ltd's lawful instructions".

[286] This was not sufficient to give the contractor confidence to proceed.

[287] The contractor promptly responded to Mr GS with indication that he was not prepared to do the job. He was concerned that no approval for the work had been obtained from the body corporate. The contractor considered that if he was to undertake the work requested, he was at risk of, as he described it, "vandalising" other people's property.

[288] An indication of the extent to which Mr GS was encouraging Ms HY in the belief that it was open to her to remove the ducting, was reflected in his advice to her concerning the reservations that had been expressed by the contractor first instructed. Mr GS took the view that the contractor was unhelpful and advised that it would be necessary to engage a contractor who was more receptive to following instructions.

[289] Six months after the first attempts had been made to engage a contractor, a second contractor was engaged. This contractor was also informed of the background to the dispute and given assurances that he would be compensated for any civil liability that may arise.

[290] Mr GS's office prepared trespass notices for service on the adjacent unit owners, in the event that either took steps to impede the contractor.

[291] The advice the lawyers provided to Ms HY in response to her request for clarification as to the consequences that could follow if she was to remove the ducting

was consistently bullish. It was advice that demonstrably in my view, failed to adequately inform Ms HY as to potential risks.

What followed on from the ducting being removed

[292] Parties who had previously indicated a disinclination to become involved in the dispute were quick to express concern at the steps taken by Ms HY.

[293] On 10 July 2018, the onsite building and rental manager wrote to the Ms HY (this correspondence copied to the management company) expressing concern.

[294] On 11 July 2018, the body corporate management company wrote to the lawyers advising that the removal of the ducting had potential to activate the sprinkler system in the common areas, and trigger the building's fire alarms.

[295] The body corporate's management company nevertheless continued to express a reluctance to become directly involved in the dispute and advised the building's property manager of its expectation that the property manager would deal directly with the unit owners and resolve the problem.

[296] Expectation that the neighbouring unit owners would raise objection was promptly realised. On 20 July 2018, lawyers for the neighbouring unit owners wrote to the lawyers making demand that the ventilation be reinstated. It was submitted for Ms HY's neighbours that the ducting system clearly fell within the definition of infrastructure and, as such, responsibility fell to the body corporate to repair and maintain the system.

[297] An owners' Committee meeting was convened on 22 August 2018. Representatives for the interested parties were among the attendees. At the conclusion of that meeting, agreement was reached that the body corporate would instruct its lawyers to make demand of ABC Ltd to reinstate the ducting. In the event that ABC Ltd failed to do so, proceedings would be commenced.

[298] On 28 August 2018, ABC Ltd's lawyers were served with demand to reinstate. This was met with response from the lawyers that the ducting was "illegal", and that it would be improper for the body corporate to take steps to repair the ducting.

[299] The lawyers insisted that the body corporate had no authority to enter Ms HY's unit for purposes of reinstating the ducting. The lawyer's response reinforced Ms HY's argument that she was entitled to remove the ducting and a willingness on her part to continue to oppose the body corporate.

[300] The body corporate responded to this with filing of proceedings in the Tenancy Tribunal.

[301] A factor to consider when examining the question as to whether a lawyer has competently advised their client in a dispute of this nature, is the need for lawyers to recognise that they must be attentive to changing circumstances and able, when required, to recognise that advice initially provided may need to be modified or in some cases significantly changed, to reflect those changing circumstances.

[302] It was required of the lawyers following steps taken to remove the ducting, to reassess the advice that had been given to Ms HY by reference to the consequences that flowed from that decision.

[303] Significant amongst those consequences, was the extent to which a number of parties both expressed concern with the steps that had been taken and a willingness to commence proceedings against Ms HY in the event that the ducting was not reinstated.

[304] Ms HY faced objection from:

(a) the council; and

(b) the building manager; and

(c) neighbouring unit owners; and

(d) the body corporate.

[305] Concern was raised that the steps taken had made it impossible for the body corporate to secure the required warrant of fitness for the building.

[306] The body corporate expressed disquiet that the building's sprinkler and fire alarm systems had been compromised.

[307] These were serious concerns for Ms HY to contend with, and it was required of her lawyers that they reassess the strategy they had been advocating.

[308] There is little evidence of the lawyers having done so. They remained entrenched in their view that the ducting was unlawful/illegal, and confident in their expectation that they would be proven right.

[309] It was required of the lawyers that they carefully assess the advice they had provided to Ms HY, and ensure that she was fully informed as to how changing circumstances could impact her position in the future.

The lawyers' response to the proceedings filed by the body corporate in the Tenancy Tribunal

[310] The Standards Committee was critical of the approach adopted by the lawyers. It considered that in several instances the lawyers had simply "failed to get the law right".

[311] The Committee concluded that the lawyers had, in defending the proceedings, focused solely on an argument that lacked a proper legal foundation.

[312] Whilst it was the case that the lawyers made the illegality argument the focus of their defence, it was not the case, as contended by the Standards Committee, that the lawyers defended the Tenancy Tribunal proceedings, at least initially, solely on the basis of advancing the illegality argument.

[313] It is clear from an examination of the lawyers' submissions that they were aware that Ms HY had opportunity to advance her case on broader grounds than a single focus on contention that the installation of the ducting had been unlawful.

[314] In submissions filed with the Tribunal on 14 December 2018, in addition to addressing the illegality argument, the lawyers contended that the body corporate's operating rules specifically provided that no owner could permit any conduct or behaviour which was likely to interfere with the use and enjoyment of the unit title development by other owners.

[315] The lawyers also noted in their submissions that a claim could arise in private nuisance, if a person unreasonably interfered with the use and enjoyment of another's land.

[316] The lawyers also argued that Ms HY had an entitlement to seek minority relief.

[317] These arguments may (as is not uncommon when a number of arguments are pleaded), have had varying degrees of force, but it cannot be fairly said of the lawyers, at least in the initial stages, that they defended the proceedings solely on the basis of the illegality argument.

[318] Concerns that the contaminated emissions were interfering with Ms HY's rights to the reasonable use and enjoyment of her unit, were also advanced in submissions filed on 5 February 2019.

[319] The submissions filed submitted that the discharge from the units constituted a nuisance and argued that the unit owners were in jeopardy of breaching provisions of

the Health Act 1956. The submissions reference concerns that had been raised by the [CITY A] Council.

[320] There was much here for the lawyers to work with, but compelling arguments that could have been profitably advanced for ABC Ltd were, in my view, subsumed by the lawyers' overwhelming commitment to the illegality argument.

[321] As the matter progressed, the lawyers' insistence on advancing the illegality argument as essentially a "stand or fall" argument, manoeuvred the lawyers into the uncomfortable position where they were constrained in advancing alternative arguments which could have effectively exposed the body corporate to criticism that it had failed to fulfil its obligations to the unit owners.

[322] In doggedly refusing to concede that the ducting may have constituted part of the building's infrastructure (it seemingly being the case that the lawyers considered that making this concession would erode their pivotal argument), the lawyers lost opportunity to sheet home arguments that could profitably have focused on the nuisance being caused by the contaminated emissions.

[323] But I do not consider that the lawyers erred in raising initial concerns as to whether the ducting had been legally installed.

[324] The ducting had been installed without Ms HY's knowledge or consent.

[325] Nor had it been notated on the original plans.

[326] The lawyers' initial discussions with the council had confirmed that the ducting had been installed without the necessary consent.

[327] Broad-brush conclusion that the lawyers had done nothing of any value and that their strategy was totally misdirected, fails to sufficiently recognise the initial steps that were taken by the lawyers, and to recognise that there was merit in the lawyers initially raising concern as to whether the ducting complied with the required building standards.

[328] But there is little evidence of the lawyers' constructing the necessary evidential foundation to support their primary argument that the installation of the ducting had been unlawful.

[329] Shortly before the hearing was to proceed, the lawyers were continuing to attempt to establish with the [CITY A] Council, as to whether the ducting was compliant.

[330] Their case demanded (particularly considering the sum that had been spent in research and preparation) authoritative evidence from a source (such as the Council), to support the argument that was being relied on.

[331] The Tenancy Tribunal adjudicator directed himself to the question as to whether the Tribunal had jurisdiction to determine whether the ducting was lawful.

[332] Having decided that the Tribunal lacked jurisdiction, the adjudicator nevertheless turned his mind to the issue and proceeded to make a finding.

[333] The adjudicator concluded that the ducts were code compliant. It was his view, that: [31]

> the evidence from the Council file shows that Council had requested producer statements (PS3 and PS4) in respect of mechanical ventilation at issue, Council has approved those producer statements and the as-built plan before Council later issues the Code Compliance Certificate for the building. In the circumstances, I find on balance that the ducts, i.e., including mechanical ventilation, had been approved by the Council and were part of the checks required for Council to issue the code compliance system. I therefore find that the ducts are lawful.

[334] Shortly before the Tribunal hearing was to proceed, the lawyers wrote to the body corporate proposing settlement. They argued that the body corporate's claim was "rendered pointless" as the Council had expressly informed the occupiers of the adjoining units that they were not permitted to use the ducting.

[335] In this correspondence, the lawyers endeavoured, at late stage, to shift the argument to focus on concerns that the body corporate had obligations to ensure that unit owners were not inconvenienced by a nuisance.

[336] The lawyers contended that they had been arguing all along that it was the body corporate's obligation to ensure that tenants were free from nuisance, and submitted that the body corporate had clearly failed in their obligation to protect Ms HY, despite having been put on notice since 2017.

[337] That did not provide accurate account of the manner in which the lawyers had advanced the argument.

[338] Whilst the lawyers had peripherally addressed the nuisance issue, their capacity to advance that argument was impeded by their commitment to argument that the ducting was unlawful. And it was not an argument that they had pursued head on with the body corporate.

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[31] [2019] NZTT Auckland 9010601 at [69]–[70].

[339] To the extent that the lawyers had engaged with the body corporate (particularly in the initial stages of the dispute), that engagement was limited to copying the body corporate into correspondence that had been sent to the property manager.

[340] It is clear from the memorandum filed by the lawyers, on 19 June 2019, that by the time the matter had navigated its way to the final Tribunal hearing on 20 June 2019, that the lawyers had firmly committed to the illegality argument.

[341] As noted, a significant criticism made of the lawyers by the Standards Committee was that the lawyers had defended the Tenancy Tribunal proceedings solely on the basis of the illegality argument.

[342] The focus of the argument before the adjudicator, was whether:

(a) the ducting comprised part of the building's infrastructure; and

(b) whether the ducting was "unlawful".

[343] It is clear from the adjudicator's decision, that the lawyers made little attempt to expand their case beyond the illegality argument, other than to advance argument that their client was entitled to minority relief.

[344] It was not the case, when all of the submissions prepared by the lawyers are considered, that the lawyers had completely overlooked other arguments that were available to them.

[345] But the extent to which the lawyers became captured by the illegality argument, to the point that they appeared to have overlooked possibility of advancing fruitful alternatives that were open to them, does, in my view, raise issue as to whether the lawyers had met their obligation to competently advise their client.

[346] The lawyers' decision to continue to focus to the extent they did on the illegality argument once the body corporate had acknowledged responsibility to repair and maintain the ducting, was an error that, in my view, can be reasonably criticised.

[347] When the body corporate stepped in and insisted that the ducting had to be reinstated, that insistence was accompanied by acknowledgement that the body corporate considered the ducting to be part of the buildings infrastructure, and a recognition that the body corporate had obligations to maintain and repair infrastructure.

[348] It is accepted that the lawyers understandably were committed to achieving their client's preferred outcome, and they likely took the view that endeavouring to resolve the

issue by reliance on the body corporate's acceptance that it was responsible for maintenance and repair could potentially result in the ducting simply being restored, and the problems continuing for their client.

[349] But the lawyers were presented with opportunity to consider options that would present less risk for Ms HY.

[350] All of the interested parties (even those who had previously sought to distance themselves from the dispute) were acknowledging of the problems with the ducting.

[351] Having stated its position, the body corporate could not step back from its obligations to repair and maintain.

[352] It was not open to the body corporate to continue to attempt to distance itself from its obligations.

[353] As noted, the problem and potential solution, had been notified to the body corporate as early as November 2017.

[354] The pressure was mounting on the body corporate.

[355] In responding to concern that Ms HY's actions in removing the ducting had caused problems for their client, counsel for the occupier of an adjoining unit signalled possibility of their client taking steps to sue the body corporate.

[356] That was not all. In March 2018, an environment health officer from the [CITY A] Council had written to Ms HY's neighbour and to the building manager, advising that both of Ms HY's adjoining neighbours were discharging cooking odours which were adversely affecting residential apartments situated above the units. The officer noted that the emissions constituted a nuisance as defined in s 29 of the Health Act 1956.

[357] The unit owners were put on notice that if satisfactory steps were not taken to mitigate or eliminate the nuisance, the council would give consideration to taking enforcement action.

[358] Ms HY clearly did not have confidence that the legal position argued for by her lawyers would inoculate her from the threat of immediate and serious repercussions arising from her decision to remove the ducting.

[359] She took steps to replace the ducting.

[360] When responding to Ms HY's complaint, the lawyers emphasised that they had never held themselves out to Ms HY as being experts in unit title and body corporate

law. They noted, that their "specialty is that we speak [LANGUAGE A] and serve the [REDACTED] migrant community. And certainly when the matter first came to us, it was not presented or framed as a body corporate issue".[32]

[361] I do not diminish the value for a [LANGUAGE A] speaking client of being able to instruct [LANGUAGE A] speaking lawyers, but the lawyers' description of their expertise as traversing litigation experience in a wide range of matters whilst arguing that they had never purported to present themselves as experts in unit title matters, appears to be argument that compatibility in communication trumps expertise in the subject area engaged by the dispute.

[362] Unit title disputes are a specialist area of the law.

[363] To suggest that the problem was not when first discussed with the lawyers, framed as a "body corporate issue", is to starkly ignore the lawyers' responsibility to examine the facts and glean a full understanding of legal context for the dispute.

[364] It is from this context, that the lawyers' continuing commitment to their position that the ducts were unlawful and that Ms HY would be successful in establishing that position must be considered.

[365] The lawyers' overarching commitment to advancing the illegality argument to the exclusion of arguments that were, as the matter progressed, becoming obviously identifiable as fruitful arguments to be advanced for Ms HY, reflected a failure to competently advise Ms HY.

Costs

[366] Consequential on the body corporate filing proceedings in the Tenancy Tribunal, it was required of the lawyers that they provide Ms HY with a careful analysis of the risks and potential costs she could likely face in defending the proceedings. Advice on such critical matters as prospects of outcome, and assessment of costs implications, would be expected to be recorded in writing.

[367] In submissions filed with the Tenancy Tribunal on 13 December 2018, the lawyers informed the Tribunal that Ms HY had incurred legal costs (relating to the proceedings) of approximately $26,000. Her total costs accrued to that date were $38,551.00.

[32] LAW FIRM C correspondence to Complaints Service, 30 November 2020 at p 15 (c)

[368] Having incurred substantial costs of close to $40,000, it could have been expected of the lawyers that they would provide Ms HY with a careful assessment as to her likely cost exposure moving forward.

[369] It is critical that lawyers understand the approach that the jurisdiction they are litigating in adopts to the awarding of costs against an unsuccessful party.

[370] When the Tenancy Tribunal was given jurisdiction to determine unit title disputes, it was anticipated that the Tribunal would be well placed to resolve dispute expeditiously and at little cost to the parties. Those objectives were seen to comfortably mesh with the Tribunal's long and successful history of managing disputes between landlords and tenants promptly with minimal financial cost to the parties.

[371] Regrettably, the Tenancy Tribunal was not equipped with the necessary powers to enable it to assert the degree of control over costs orders that many familiar with the jurisdiction considered would have been appropriate.

[372] The Tribunal (unlike the Courts and a number of Tribunals) does not have recourse to costs schedules.

[373] In the process of evolving an approach to the awarding of costs in unit title cases, two factors have assumed significance.

[374] Firstly, the courts have directed that successful parties may recover costs in the Tribunal on an indemnity basis.

[375] Secondly, the courts have observed that adjudicators are to approach the determination of costs, by reference to what the adjudicator considers to be an assessment as to what level of costs would be considered reasonable.[33]

[376] Both costs incurred by a body corporate management company, and costs incurred by lawyers instructed to act for the body corporate, are recoverable.

[377] It is not uncommon in unit title cases, for the Tenancy Tribunal to make significant costs awards in favour of successful parties.

[378] Whilst the lawyers could not be expected to have been able to provide Ms HY with guarantee of outcome, it became compellingly clear following the removal of the ducting, that any decision to continue to oppose the body corporate's application had to give careful consideration to the fact that Ms HY had:

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[33] See for example *French v Ryan* DC CIV-2012-004-711 (29 November 2012).

(a) incurred substantial legal costs; and

(b) become exposed to risk of incurring significant further costs.

[379] In responding to accusation that they had failed to adequately inform Ms HY as to her potential costs exposure, the lawyers submitted that they had drafted a response to the body corporate's indication of intention to file proceedings in the Tribunal, and had provided this draft to Ms HY for her consideration. It was argued by the lawyers, that their response explicitly addressed the costs issue. The lawyers contended that it was "puzzling how Ms HY can now complain that she had no idea about the costs risk".[34]

[380] The lawyers' suggestion that they had advised Ms HY adequately on cost issues is not supported by the correspondence relied on by the lawyers.

[381] To the extent that the correspondence addressed the question of costs, the correspondence simply expresses the lawyers' view that they did not consider that the body corporate had grounds to pursue a claim, and therefore no basis on which it could seek a costs award.

[382] This was not an analysis on which Ms HY could make a considered and informed decision as to whether she wished to proceed. It was correspondence that reinforced, as did other correspondence advanced by the lawyers in the course of the proceedings, both the lawyers' confidence in the correctness of their position, and their surprise that what they perceived to be the compelling correctness of their argument had not been accepted by opposing parties.

[383] In *McGuire v New Zealand Law Society*,[35] the presiding judge considered a lawyers' obligation to ensure that a client was informed as to potential risks and costs involved in litigation.

[384] In *McGuire*, the Standards Committee that had first considered the complaint, concluded that as part of substantive legal services provided, a client was entitled to advice as to whether his or her claim was worth pursuing in a monetary sense. The Court noted that there was an obligation on a lawyer to warn their client of the risk that fees calculated on a time and attendance basis could exceed the value of the claim.

[385] The judge concluded that the Committee was correct to treat a cost/benefit analysis as a matter reasonably arising in the course of carrying out a client's instructions, noting that for "most individual litigants, evaluating the cost of the

[34] LAW FIRM C, correspondence to Complaints Service (30 November 2020) at [38].
[35] [2017] NZHC 2484.

proceeding against the likely amount to be gained is fundamental to the decision whether to proceed to a hearing". The court observed that this situation applied even in circumstances where the remedy sought was not a monetary sum. The question that frequently arose in litigation was whether it was worthwhile to proceed further? The court noted that a client can only answer this question if "he or she knows the likely risks, likely rewards and likely costs"[36].

[386] It was further noted in *McGuire* (and affirmed on appeal to the Court of Appeal),[37] that a lawyer is not inoculated from criticism of having failed to sufficiently inform their client as to the risks and costs of litigation, by argument that the client would have proceeded with the claim in any event. The issue focuses on the quality of the advice provided, and the opportunity given to the client to make an informed decision.

[387] Argument is advanced by the lawyers that Ms HY's dissatisfaction with the final outcome was reflective of her experiencing buyer's remorse, and that every party engaged in litigation gambles on outcome.

[388] With respect to the lawyers, that argument misses the point. It is unquestionably the case that all litigation carries risk, but the question relevant for this review is whether the lawyers sufficiently informed Ms HY of those risks.

[389] As emphasised in *McGuire*, it is critical for a lawyer that they ensure that their client is well-positioned to make an informed decision as to whether it is worthwhile to continue to incur litigation costs.

[390] That judgement not infrequently has to be made in situations such as those confronted by Ms HY, by reference to the other options available, and with necessary consideration of the likely costs that could be incurred, if alternatives to litigation were considered.

[391] It was understandable that Ms HY felt aggrieved that she had been put in a difficult position through no fault of her own, but irrespective as to how strongly she felt about the injustice of the situation, as an experienced businesswoman she would have been mindful that, on occasions, business problems require pragmatic solutions.

[392] A factor that required consideration, was the likely costs if steps were taken to remediate the defects in the ducting system.

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[36] At [42].
[37] [2018] NZCA 184 at [25].

[393] There was evidence to suggest that the problem could be remedied at a cost in the vicinity of around $25,000.

[394] At the point where Ms HY had incurred costs in the region of $40,000 without any tangible return, it was required of the lawyers that they provide Ms HY with a careful assessment of likely costs moving forward, and that they ensure that she was fully informed as to the extent to which she was exposed to possibility of a substantial costs order in the event that she was unsuccessful.

[395] There is minimal evidence of the lawyers having carefully explained to Ms HY other than in superficial fashion, the litigation risk, and the extent to which she could be exposed to incurring significant costs

[396] That omission, in my view, constituted a failure on the part of the lawyers to provide Ms HY with competent advice.

Failing to inform the Tenancy Tribunal that the ducting had been reinstated.

[397] After the Tenancy Tribunal delivered its decision, Ms HY engaged fresh counsel. Counsel was instructed to respond to the adjudicator's direction that the parties file submissions on costs.

[398] Counsel for Ms HY argued that the proceedings before the Tribunal were moot, as the ducting had been reinstated prior to the body corporate's application being heard.

[399] The ducting had been reinstated several months prior to the hearing.

[400] In his cost decision delivered on 17 October 2019, the adjudicator noted that argument that the orders sought by the body corporate became moot after 10 December 2018 had never been raised before him in the previous hearings.

[401] The Tenancy adjudicator had presided over a hearing which progressed over several months, at the heart of which was an application by the body corporate for orders directing that the ducting be reinstated, and was seemingly not informed by either party that the outcome sought by the applicant (and resisted by the respondent) had been achieved.

[402] When the lawyers advised the body corporate in December 2018 that the ducting had been reinstated, they emphasised that Ms HY had only done so to preserve her position, and that she would be advancing her claim for minority relief.

[403] The lawyers' response reflected the considerable confidence they retained in their argument. Their indication of intention to pursue a claim against the body corporate, likely dictated that the proceedings would continue.

[404] It would be understandable that the body corporate would be reluctant to withdraw its application, albeit that the outcome sought had been achieved.

[405] But questions can reasonably be asked of the lawyers as to whether they had maximised the opportunities available to them following their client's decision to restore the ducting, and whether the decision to continue with the litigation should not have been given more careful scrutiny.

[406] Demand could have been made of the body corporate to withdraw its application.

[407] If the litigation was to proceed, the lawyers had opportunity to reframe the argument and shift attention from the illegality issue, to focus on the continuing failure of the body corporate to meet its obligations to the unit owners.

[408] A more narrowly focused argument may have avoided some of the substantial litigation costs.

[409] When the lawyers wrote to the body corporate on 17 June 2019 (two days prior to the commencement of the final hearing) suggesting settlement on the basis that the body corporate withdraw its claim with no issue as to costs, the lawyers noted that the body corporate's application was "pointless", as a consequence of the council's direction that the owners of the units adjoining Ms HY's were prohibited from using the ducting.

[410] That argument could have been raised much earlier.

[411] The lawyers could equally have emphasised the apparent incongruousness of what had become a lengthy hearing, continuing to focus on an application for a remedy that the applicant had achieved.

[412] The fact that the adjudicator seemingly remained oblivious to the fact that the ducting had been restored, is reflected in the orders made by the adjudicator. Orders were made permitting the body corporate to enter Ms HY's unit for purposes of repairing and reinstating the ducting, together with orders directing ABC Ltd to refrain from interfering with the body corporate's remediation work.

[413] Further, the adjudicator anticipated that he would be required to consider, at a future date, a cost claim by the body corporate for reasonable costs associated with the reinstatement.

[414] Continuing the argument with focus on the reinstatement issue may well have had cost implications for Ms HY.

[415] In the period January to June 2019, Ms HY incurred additional legal costs of $30,607.40 (GST inclusive) and became the subject of a costs order in the sum of $37,838.17. She had incurred costs of around $68,445.37 opposing an application for orders compelling her to do something that she had already done.

[416] Ms HY's decision to reinstate the ducting was an understandable response to the significant pushback she had encountered.

[417] It is difficult to identify what advice the lawyers provided to Ms HY at the point where the decision was made to advise the body corporate that she wished to withdraw her application.

[418] A feature that has been consistent when examining the steps taken at critical junctures in the litigation is the absence of evidence of the lawyers taking steps to record their advice to Ms HY in writing.

[419] In the face of the body corporate's refusal to agree to withdraw their application on the basis that the parties would cover their own costs, it was demanded of the lawyers that they carefully address with Ms HY the costs she had incurred (prior to the hearing proceeding) and her likely cost exposure if she was to have no success in the Tribunal.

[420] There is no evidence of that analysis having been undertaken.

[421] There is no indication of the lawyers seeking clarification from the body corporate as to what the body corporate would be seeking in the way of costs.

[422] There is no indication as to whether consideration was given to narrowing the argument before the Tribunal to an argument focused solely on costs.

[423] A focused costs argument may have provided opportunity for the lawyers to direct attention to the failure of the body corporate to engage with Ms HY, and its failure to meet its obligations to the unit owners.

[424] That approach may have provided fertile opportunity for Ms HY to minimise her costs.

[425] In proceeding to hearing, the argument becomes sharply centred on the infrastructure/illegality contest.

[426] Whilst it has been emphasised that it is not the role of the LCRO to minutely scrutinise and second-guess every step taken by counsel in the course of litigation, the obligations on a lawyer, to ensure that their client is fully informed on litigation options, is a matter which property falls for consideration when addressing the question as to whether a lawyer has provided their client with competent advice.

[427] The strategy adopted by the lawyers in advancing matters before the Tenancy Tribunal did not, in my view, give adequate consideration to the extent that the initial strategy advanced required a degree of modification in light of the steps taken by Ms HY to restore the ducting, the effect that decision had on the body corporate's application, and the indication from her prior to the hearing proceeding that she was prepared to withdraw.

Were the fees charged fair and reasonable?

[428] The Standards Committee did not consider it necessary to undertake an assessment of the fees by reference to an analysis of the factors that would commonly be considered when undertaking a cost assessment. All of the fees charged were cancelled on grounds that none of the work undertaken had any value for Ms HY.

[429] It will be apparent from what has gone before, that I do not agree with the Committee's conclusion that none of the work completed had value for Ms HY.

[430] I have undertaken an assessment of the fairness and reasonableness of the fees charged, by adopting the conventional approach of:

(a) examining the work completed; and

(b) scrutinising the invoices by reference to work completed; and

(c) considering the fees charged by reference to the r 9 factors.

[431] There is no indication of the lawyers having provided the Standards Committee with copies of time records.

[432] The notice of hearing issued by the Standards Committee, invited the lawyers to provide comment as to whether they considered that fees charged were fair and reasonable, and informed the lawyers that the Committee would, in undertaking its analysis of the fees, give consideration to the r 9 factors.

[433] The lawyers' response to complaint that fees charged were excessive was to emphasise that Ms HY had been appropriately cautioned as to the litigation risks, and insistent in her position that the lawyers continue to litigate the argument with the body corporate. It was argument that this level of costs was incurred because the lawyers were obliged to follow their client's instructions.

[434] I am not persuaded that Ms HY exercised the degree of influence and control over the direction of the litigation as argued for by the lawyers.

[435] I am satisfied that the lawyers' advice was influential, at critical stages of the proceedings, in shaping the path the proceedings took.

[436] It has been recognised that determining a reasonable fee "is an exercise in assessment, an exercise in balanced judgement, not an arithmetical calculation".[38]

[437] It is difficult to approach consideration of the fees charged in this matter, without having particular regard to r 9.1, the importance of the matter to the client and results achieved.

[438] At the core of Ms HY's criticism of the fees charged, was allegation that she had been poorly advised.

[439] Whilst I have disagreed with the Committee's conclusion that none of the work completed for Ms HY had value, I do nevertheless conclude that the approach adopted by the Committee (that is to assess the fee primarily by reference to results achieved) is an appropriate approach to adopt when examining the work undertaken by the lawyers, subsequent to mid-December 2018.

[440] The work that was undertaken after December 2018, was narrowly focused on the Tribunal proceedings.

[441] The invoices prepared by the lawyers provide but brief notation recording the work completed.

[442] Work invoiced from 15 June 2017 to 18 December 2017, totalled (GST inclusive) $9,596.28. The work completed in this period was primarily for attendances on Ms HY. The fee charged presents as a significant fee for the work that had been done.

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[38] *Property and Reversionary Investment Corp Ltd v Secretary for State of the Environment* [1975] 2 All EE 436 (EWCA).

[443] That said, the lawyers were conscientious in rendering their invoices on a monthly basis and there is no evidence of Ms HY having raised objection with the fees.

[444] In October 2018, the lawyers had prepared the opinion for Ms HY which set out their view of the legal issues and their advice as to the steps that Ms HY could take. Fees charged for October 2018 (GST inclusive) were $6,816.10. The work undertaken was for "research and draft application".

[445] Work undertaken by the lawyers in November 2018, similarly, focused on the Tribunal proceedings. Fees rendered for November 2018, were $12,634.05 (GST inclusive).

[446] Costs incurred for work specifically focused on providing an opinion on legal issues and responding to the Tribunal proceedings, amounted to $19,450.15 (GST inclusive).

[447] Fees rendered, to the period ending December 2018, reflected a substantial amount of time having been spent on researching the legal issues that were to be at the forefront of the argument in the Tenancy Tribunal. Those issues did not change or evolve to embrace further arguments as the matter progressed. It could have been expected of the lawyers that they would have had a thorough grasp of the legal issues by the end of 2018.

[448] Considering the nature of the issues to be addressed by the Tribunal, it could have been reasonably expected, that costs approaching $20,000 for research and initial drafting, would have come close to meeting the costs of preparation for the impending hearing.

[449] In February 2019, the lawyers rendered Ms HY an invoice in the sum of $13,906.58 (GST inclusive). This fee was to cover work involved in:

(a) discussions with the Council concerning the legality of the ducts; and

(b) attendance at the Tribunal; and

(c) conducting legal research and preparing further submissions.

[450] At the conclusion of the hearing, the lawyers rendered an invoice in the sum of $14,933.25 (inclusive of GST and disbursements).

[451] Fees charged in respect to preparing for and attending the Tribunal hearings were substantial.

[452] A lawyer must not charge a client more than a fee that is fair and reasonable, having regard to the interests of both client and lawyer, in addition to the factors set out in rule 9.1.

[453] In my view, the fees charged by the lawyers for the period January 2019 to 2 June 2019 were neither fair nor reasonable.

[454] Fees charged for research and preparation were excessive. An examination of the material filed with the Tribunal indicates a degree of replication.

[455] Rule 9.1(c) provides that a factor to consider when addressing the reasonableness of a fee, is the importance of the matter to the client, and the results achieved.

[456] No tangible benefit was achieved for Ms HY.

[457] Lack of success in litigation is not determinative of the issue as to whether a fee charged by a lawyer is fair and reasonable.

[458] But in considering the strategy adopted by the lawyers following Ms HY's decision to reinstate the ducting, I am persuaded that the lawyers' continuing commitment to the illegality argument, to the exclusion of appropriate focus on alternative remedies, was a significant factor in contributing to the unhappy outcome for Ms HY. The lawyers' failure to be sufficiently responsive to changing circumstances, and their failure to ensure that Ms HY was adequately informed as to her costs exposure, are matters to take into consideration when considering the requirement that a fee be considered by reference to the interests of both lawyer and client.

[459] Costs incurred by Ms HY directly related to the Tribunal proceedings (GST and disbursements inclusive) were close to $50,000.

[460] Total costs invoiced to Ms HY (inclusive of GST and disbursements) amounted to $68,966.40.

[461] By any assessment, this is a significant sum of costs to incur in defending proceedings of the nature as those filed in the Tenancy Tribunal. When the costs awarded against Ms HY are consolidated with her legal costs, she is left with a total liability of around $106,804.30.

[462] When the issues engaged by the dispute are examined, and consideration is given to options available to Ms HY other than to litigate (particularly a consideration of the cost that would be involved if steps had been taken to remediate the problem), it is

difficult to imagine that Ms HY would have considered it commercially feasible to expose herself to risk of incurring such a significant financial loss.

[463] It is difficult, in circumstances where it has been concluded that a component of the work completed for a client has been necessary and productive, but that a significant amount of work done had little or no value to the client, to determine with precision what is considered to be a fair and reasonable fee.

[464] It is an exercise which unavoidably requires a somewhat “broad-brush” approach.

[465] In my view, an appropriate approach to that assessment, and approach which has proper regard to the interests of both client and lawyer, and to the reasonable fee factors, is to determine that:

(a) fees charged to (and including) 12 December 2018, were fair and reasonable; and

(b) fees charged subsequent to the invoice rendered on 12 December 2018 were not fair and reasonable.

[466] I consider that from the point that Ms HY made a decision to reinstate the ducting, it was demanded of the lawyers that they reassess their approach to the continuing litigation.

[467] There is no indication of them having done so.

[468] The lawyers continuing commitment to the advancing of argument in the Tribunal with focus on an illegality argument which required , in my view, a stronger evidential foundation than the lawyers had been able to construct, together with the lack of indication of a hardnosed assessment of the considerable costs that had been accrued with reference to both risk of future litigation, and consideration as to alternative means of remediation (options for which were becoming demonstrably clearer with the decision of the body corporate to engage, and the indication that other unit owners were desperately seeking solution) leads to fair conclusion that fees charged after the invoice rendered on 12 December 2018, were unreasonable.

[469] On that assessment, I conclude that a fee of $38,358.74 (inclusive of GST and disbursements) was fair and reasonable.

The competency issue – Conclusions

[470] it has been emphasised that considerable care must be exercised when examining steps taken by lawyers in the course of litigation. A Review Officer will be cautious of criticising a lawyer's strategy and mindful that, in many cases, lawyers will have markedly different views as to how a particular case can best be advanced.

[471] But it is not the case that lawyers can avoid consequence for poor decisions made in the course of litigation by finding safe haven in argument that the raft of options open to a lawyer are so expansive that it is rare occasion when a decision taken by a lawyer can be considered to have been mistaken as opposed to simply reflecting an approach that was open to the lawyer to have followed.

[472] Whilst it cannot be demanded of a lawyer that they are able to predict a litigation outcome, it can be expected of them that they ensure that their clients have a robust contestable argument to advance. It can also be demanded of lawyers, that they are responsive to litigation's changing tides, and alert to circumstances which have potential to impact on the viability of their client's case.

[473] I have scrutinised the arguments advanced by the lawyers in the Tenancy Tribunal and considered those arguments not simply by reference to the submissions filed, but by reference to the steps taken in progressing the file from commencement of the retainer to the conclusion of the Tribunal hearing.

[474] Having done so, I conclude that the lawyers' conduct fell short of the standard of competence and diligence required.

[475] The errors made by the lawyers which, considered in their totality, persuade me that the lawyers breached their obligations to represent Ms HY competently and diligently were:

(a) the failure to sufficiently explain to Ms HY, the risks to which she would be exposed if she took steps to reinstate the ducting; and

(b) the failure to adequately consider the extent to which the removal of the ducting would impact on parties beyond Ms HY's immediate neighbours; and

(c) the failure to explain to their client that removal of the ducting could potentially compromise the building's capacity to ensure compliance with its health and safety obligations; and

(d) the failure to appreciate the extent to which the body corporate had inevitably, at some point, to be engaged in the process of resolving the problems faced by Ms HY; and

(e) the failure to adequately address the cost risks that Ms HY would be exposed to if she continued to defend the proceedings in the Tenancy Tribunal; and

(f) the failure to explain to Ms HY that she faced possibility of costs being awarded on an indemnity basis; and

(g) the failure to adequately reassess the litigation strategy and display a responsiveness to changing circumstances, particularly after December 2018, when Ms HY had reinstated the ducting; and

(h) the failure to inform the Tenancy Tribunal that the ducting had been reinstated, and to consider the strategic steps that could have been taken at that point to either compel the body corporate to withdraw its application, or to have the application before the Tribunal refined such as to achieve less costs for their client in the Tribunal; and

(i) the failure to ensure that the argument advanced to the Tribunal was supported by relevant independent evidence.

If it is established that the lawyers failed to provide Ms HY with competent advice, did that failing merit or require the unsatisfactory conduct findings?

[476] In considering this question, I remind myself of the obligations of a Review Officer to bring an independent and robust approach to the process of review. That includes a careful consideration as to whether conduct breaches, if established, require a disciplinary response.

[477] The purposes of the Act include the maintenance of public confidence in the provision of legal services and protection for the consumers of legal services.[39] The Act imposes "fundamental obligations" on lawyers, those obligations including the requirement to "act in accordance with all fiduciary duties and duties of care by lawyers to their clients".[40]

[39] Lawyers and Conveyancers Act 2006, s 3(1)(a).
[40] Lawyers and Conveyancers Act 2006, s 4(c).

[478] As noted in *Lagolago v Wellington Standards Committee 2,* the unsatisfactory conduct under s 12 (a), which references the reasonable expectations of the public, is a consumer driven standard.[41]

[479] The finding of unsatisfactory conduct in respect to Mr GS is confirmed.

[480] I am satisfied that Mr GS played a significant role in formulating the strategy that was advanced by the lawyers, and that he bore considerable responsibility for the oversights in failing to keep Ms HY sufficiently informed.

[481] The Committee entered three findings of unsatisfactory conduct against Mr SW.

[482] The Committee concluded that whilst Mr GS had carried out most of the work, the failings that had been identified were also attributable to Mr SW, "given his position as principal of the firm and his full support of the decisions made".

[483] The Committee's finding that the only fair and reasonable fee was no fee, provided foundation for a further unsatisfactory conduct finding. The Committee considered that both Mr SW (and his firm) were responsible for the fees charged, and entered a further unsatisfactory conduct finding against Mr SW's firm ([LAW FIRM A]).

[484] A third finding of unsatisfactory conduct made against Mr SW, was arrived at on the back of the Committee's conclusion that Mr SW had failed to ensure that staff were competently supervised and managed.

[485] With every respect to the Committee, entering a further unsatisfactory finding on grounds that Mr SW had failed to provide adequate supervision, presented as somewhat heavy handed.

[486] I agree with the Committee that Mr SW was intimately involved in the decision-making. Mr SW responded at the hearing to questions as to the extent to which he had exercised a degree of supervision over his staff, by emphatically emphasising the extent to which he was actively involved in progressing the file, not in the capacity as a supervising principal, but rather as a lawyer directly involved in the decision-making.

[487] Mr SW advised that he had appeared at the initial Tribunal hearing. He said that he met regularly with Mr GS to discuss the file. He describes a scenario where both he and Mr GS were working closely together on the file.

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[41] *Lagolago v Wellington Standards Committee 2* [2016] NZHC 2867 at [56].

[488] Mr SW emphasised that he fully supported the decisions made in the course of the litigation.

[489] A finding that Mr SW had failed to provide adequate supervision fails to reflect the extent to which Mr SW had been directly involved in the management of the case.

[490] It is effectively imposing a double penalty on Mr SW by finding that both he and Mr GS's conduct in managing the file had been unsatisfactory, whilst overarching those findings with conclusion that Mr SW had failed to provide adequate supervision of an employee who had significant litigation experience.

[491] The finding that Mr SW's conduct was unsatisfactory on grounds that he had failed to adequately supervise is reversed.

If the Committee was correct to conclude that the lawyers' conduct constituted unsatisfactory conduct, were the penalties imposed consequential on those findings appropriate?

Penalty

[492] The primary purpose of disciplinary proceedings is to protect the public and to maintain professional standards.

[493] As noted in *Z v Dental Complaints Assessment Committee*:[42]

> … The purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioners for misbehaviour, although it may have that effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned.

[494] In *Roberts v The Professional Conduct Committee of the Nursing Council Of New Zealand*,[43] the High Court considered the principles and purposes relevant to the assessment of penalty orders in a professional disciplinary context, and observed that the purposes of a penalty order were:

(a) to protect the public, which includes deterring others from offending in a similar way; and

(b) to set professional standards; and

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[42] *Z v Dental Assessment Committee* [2008] NZSC 55 [2009] 1 NZLR 1 at [97].
[43] *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.

(c) penalties of a punitive function, both direct (such as a fine) and as a by-product of sanctions imposed (though this is not the main purpose of penalty orders); and

(d) rehabilitation of practitioners where appropriate; and

(e) to impose penalties that are compatible to those imposed in similar circumstances; and

(f) to reserve the maximum penalties for the worst offending; and

(g) to impose the least restrictive penalty that can reasonably be imposed in the circumstances; and

(h) to assess whether the penalty is a fair, reasonable and proportionate one in all the circumstances.

[495] It is rare for a Review Officer to interfere with penalties imposed by a Committee. A Review Officer will not engage in "tweaking" orders. In order for a Review Officer to interfere with a fine imposed, the Officer must be satisfied that there are demonstrable issues with the penalty order that merit intervention.

[496] There do not tend to be comparable cases in disciplinary proceedings because of the wide range of conduct that can be subject to such proceedings and because of the relevance of wider factors, making each case very fact specific.[44]

[497] Whilst the Committee's unsatisfactory conduct findings with one exception have been upheld, I have not concluded that the lawyers' conduct breaches were at the degree of seriousness as had been concluded by the Committee.

[498] The starting point for the Committee, was its conclusion that none of the work done had value.

[499] It inevitably follows that penalties imposed on that basis cannot be sustained on the back of my conclusion that a significant amount of work done by the lawyers had value for their client.

[500] The highest fine a Standards Committee may impose is $15,000. Imposition of a fine at the maximum level should be reserved for the most serious instances of unsatisfactory conduct.

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[44] *Deliu v National Standards Committee and the Auckland Standards Committee No 1* [2017] NZHC 2318 at [165].

[501] The factors typically taken into account when assessing penalty in the context of a finding of lack of competence, include:

(a) the nature and seriousness of the relevant error(s), and the context in which the error(s) occurred; and

(b) the extent of the incompetence, and the number of errors involved; and

(c) whether the relevant conduct was prolonged or repeated; and

(d) any adverse impact or harm caused by the lawyers' conduct and/or the level of risk posed by the relevant conduct; and

(e) the experience of the practitioner; and

(f) steps taken to rectify the error(s).

[502] Where the error made is a "one-off" error which has had relatively minor consequence for the client, a fine in the vicinity of $1,000–$2,000 has generally been considered appropriate.

[503] In circumstances where there have been multiple errors, or errors of a more serious nature, fines in the range of $3,000–$5,000 are likely to be imposed.

[504] Fines at the upper end of the spectrum, are reserved for those circumstances, where errors made are considered to constitute mistakes of the most serious kind.

[505] Turning firstly to the fine imposed on Mr GS, I consider that a reduction of $1,000 in the fine imposed is appropriate.

[506] The maximum fine of $15,000 was imposed on Mr SW. When accompanied by orders that Mr SW pay compensation to Ms HY in the maximum sum permissible, and direction that fees of approaching $70,000 be remitted, it can reasonably be concluded, that the Committee considered that Mr SW (and Mr GS's) conduct approached a level of egregiousness where serious consideration be given as to whether the conduct merited a referral to the Disciplinary Tribunal.

[507] I consider the Committee's approach to both penalty and compensation to have approached the excessive.

[508] The Committee noted that Mr SW's significant disciplinary history was an aggravating feature which warranted an uplift in the fine.

[509] Request was made of the Complaints Service to provide the LCRO with a copy of Mr SW's disciplinary history.

[510] That history recorded one finding of misconduct, and seven unsatisfactory conduct determinations having been made against Mr SW in the period 2014 to 2021.

[511] This is a concerning disciplinary record, and one which the Committee understandably considered was an aggravating factor warranting an uplift in the fine imposed. I agree with the Committee that Mr SW's disciplinary history is significant in this case, to the question of penalty.

[512] However, having reached a different view to the Committee on the issue pivotal to the Committee's decision (it's finding that nothing of value was done for the client), I am not persuaded that imposition of the maximum fine permissible is required.

[513] I consider a fine of $7,000 to be appropriate.

[514] The Committee directed that Mr GS and Mr SW be censured. I consider the unsatisfactory conduct findings, fines, reduction of fees and orders for compensation to constitute a satisfactory disciplinary response without need for accompaniment with censure orders.

Compensation

[515] The Committee's assessment as to the appropriate level of compensation, proceeded on the basis of the analysis that had underpinned its decision. As the lawyers were entirely misdirected in defending and advancing the proceedings in the Tenancy Tribunal, they should be required to compensate Ms HY (to the extent the compensation provisions in the Act allowed) for the loss she had suffered.

[516] Compensation in the maximum sum permissible ($25,000) was awarded to partially offset the costs order made by the Tribunal in the sum of $37,838.17.

[517] The Committee's approach to the issue of determining an appropriate level of compensation was relatively straightforward.

[518] An assessment that nothing of value was achieved, accompanied by finding that the lawyers had totally got the law wrong and misdirected their client, provided the Committee with a straightforward path to determining both penalty and compensation.

[519] It is a more difficult exercise when finding is made that the lawyers made significant errors in the course of conducting the litigation, but that the mistakes made were not as comprehensive as had been concluded by the Committee.

[520] The lawyers' failure to sufficiently inform Ms HY, as to her potential cost exposure, was a significant error.

[521] The costs awarded by the Tribunal were substantial. There is no indication in the Tribunal decision of the adjudicator undertaking, as he was able to do, a scrutiny on a line-by-line basis as to whether the fees claimed by the body corporate were reasonable. Rather, his approach to the costs issue was influenced by his conclusion that the decision to remove the ducting constituted a "wilful or negligent act or omission".

[522] I am in agreement with the Committee that there were significant flaws in the lawyers' approach to advancing the litigation in the Tenancy Tribunal from January onwards, but I have not concluded that the errors were so totally encompassing as to place Ms HY in the position where she was completely absolved of any responsibility for litigation risk. Her determination to proceed with removing the ducting after leaving the issue in abeyance for a considerable period of time, whilst supported by the advice she had received from her lawyers, was an outcome that I am satisfied she was committed to. The reasonable criticism that can be made of the lawyers is that they did not sufficiently alert her to the level of risk she was exposed to, and possibility of viable alternative approaches to resolving the problem.

[523] I do not consider that imposition of the maximum measure of compensation is required.

[524] I consider that compensation in the sum of $15,000 is appropriate.

Publication: Mr SW/ Mr GS

[525] The considerations to be taken into account in determining whether an order for publication including the identity of the practitioners should be made are set out in reg 30 of the Complaints Service and Standards Committee Regulations.[45] That regulation provides:

> (a) When deciding whether to publish the identity of a person who is the subject of a censure order, a Standards Committee and the Board must

[45] Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.

take into account the public interest and, if appropriate, the impact of publication on the interests and privacy of—the complainant; and

(b) clients of the censured person; and

(c) relatives of the censured person; and

(d) partners, employers, and associates of the censured person; and

(e) the censured person.

[526] The proper approach to publication more generally has been the subject of a number of decisions of this office and elsewhere. Applicable principles in respect of publication which can be drawn from a number of cases include:

(a) disciplinary proceedings are taken in the public interest and public interest factors are of primary importance at each level of decision-making; and

(b) the public interest requires consideration of the extent to which publication would provide some degree of protection to the public and the profession (*S v Wellington District Law Society*)[46]; and

(c) the common law of New Zealand recognises the major interest in the openness of proceedings before the courts and tribunals. The value of public accountability is one of the values to be imputed by way of parliamentary intention in the absence of clear indications to the contrary, and the values of public education and alerting to risk are related and of significance (*Director of Proceedings v Nursing Council of New Zealand*)[47]; and

(d) the public's right to know when practitioners have infringed the standards of the profession (*Gill v Wellington District Law Society*)[48]; and

(e) the maintenance of the reputation of the legal profession (*Bolton v Law Society*)[49]; and

(f) the deterrent and educative value of publication to the legal profession.

[46] [2001] NZAR 465 (HC) at 469.
[47] [1999] 3 NZLR 360 (HC) at 378.
[48] (HC Wellington AP 120/93 (7 December 1993) at [9].
[49] [1994] 2 All ER 486 (EWCA).

[527] The overriding factor is whether publication will serve the public interest, and whether that interest is greater than opposing interests such as the privacy interests of the lawyer. The relevant principles have been discussed in many cases and it is not necessary to set these out in detail.

[528] A publication order is not imposed as a penalty, although it would be disingenuous to suppose that publication of a practitioner's name would have no adverse impact. While the overriding factor will be the public interest, this is nevertheless to be weighed against other factors, including the impact on the lawyer or third parties of such publication.

[529] Publication is not punitive and although it acts as a deterrent, it is not necessary to publish a practitioner's name to achieve deterrence. Deterrence, and education, can be achieved by publishing facts without identifying the practitioner concerned.

[530] The Committee notes in its decision, that it had, after a "lengthy discussion" concluded that it was appropriate to make orders directing publication.

[531] I do not wish to embellish the Committee's words with meaning that was not intended, but indication that the Committee engaged in a lengthy discussion on the publication issue would suggest that the issue may have been finely balanced.

[532] In addressing the issue of public protection, the Committee noted that the lawyers promoted their business to a "vulnerable community, and that it is to a large extent a community of immigrants, and it is relevant that individuals in vulnerable communities are protected by publication orders as it will enable them to make an informed decision about who to instruct to represent them".[50]

[533] I am uncertain as to what information the Committee placed reliance on in reaching conclusion that the lawyers were promoting their services to a "vulnerable" community, though it is accepted that the lawyers specifically promoted their competency in speaking [LANGUAGE A] as a specific point of difference which had considerable value for members of the [REDACTED] community.

[534] Whilst it is accepted that a lack of fluency in the language of the law can present considerable problems for non-English speakers, the extent to which that difficulty can be accurately or fairly categorised as a vulnerability is best assessed on a case-by-case basis.

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[50] Standards Committee decision (29 March 2022) at [13].

[535] It was submitted by the lawyers (and this was not challenged) that Ms HY was a sophisticated businesswoman who had built a property portfolio valued in the millions of dollars.

[536] Indication of that degree of business acumen would not support conclusion that Ms HY could reasonably be described as a "vulnerable" client.

[537] Another factor, given consideration by the Committee, was that the matter "involved (among other things) a rare indemnity costs awarded against the client".

[538] Whilst the Tribunal's approach to assessing costs is overarched with requirement that the adjudicator consider the reasonableness of the costs sought, the Tribunal is able, and does, order costs incurred by a party instructing counsel. Costs are also assessed by reference to the body corporate operational rules. The Tribunal may make orders directing full payment of solicitor client costs.[51]

[539] Costs incurred by a body corporate in receiving legal advice or support prior to filing proceedings can also be recovered.[52]

[540] The approach adopted by the Tribunal can then, on occasions, result in costs orders which provide opportunity for a successful party to recover all, or close to all, of the costs incurred.

[541] I have given careful consideration to the question as to whether the Committee's order directing publication of the lawyers' details should stand.

[542] Having determined that the errors made by the lawyers were (whilst significant) not at the level of seriousness as has been concluded by the Committee and having concluded that a component of the work done by the lawyers had value for the client, I do not consider that a publication order is required in the public interest.

[543] The order directing publication is reversed.

Costs

[544] Where an adverse finding is made or upheld, costs will be awarded in accordance with the Costs Orders Guidelines of this Office.

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[51] *Body Corporate 95320 v Milne Investments Ltd* [2021] NZTT Auckland 9031021 (30 September 2021) at [16].
[52] Above at [18].

[545] The lawyers have been partially successful with their application, but the Committee's findings of unsatisfactory conduct have in large part been upheld.

[546] A considerable amount of time has been involved addressing the issues engaged by the review.

[547] Taking into account the Costs Guidelines of this Office, Mr GS, Mr SW and [LAW FIRM A] are (jointly and severally), ordered to contribute the sum of $4,000 to the costs of these reviews, that sum to be paid to the New Zealand Law Society within 30 days of the date of this decision.

[548] The order for costs is made pursuant to section 210(1) of the Lawyers and Conveyancers Act 2006.

Enforcement of money orders

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

Publication

[550] 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.

Orders

(a) The determination that Mr SW's conduct had been unsatisfactory consequential on the Standard Committee's finding that Mr SW had breached r 11.3 (failing to ensure that Mr GS and Mr JC were adequately supervised) is reversed (section 211(a) of the Act).

(b) The determination that Mr SW and Mr GS's conduct had been unsatisfactory consequential on the Standard Committee's finding that Mr SW and Mr GS had failed to meet the minimum standards of competence and diligence such as to constitute a breach of r 3 of the Rules and ss 12(a) and 12(c) of the Act is confirmed (section 211(a) of the Act).

(c) The determination that Mr SW and Mr GS's conduct had been unsatisfactory consequential on the Standard Committee's finding that

Mr SW and Mr GS had charged fees that were not fair and reasonable (a breach of r 9 of the Rules) is confirmed (sections 152(2)(b) and 12(c) of the Act).

(d) The order that Mr SW and Mr GS be censured is reversed (section 211(a) of the Act).

(e) The order that Mr GS, Mr SW and [LAW FIRM A] are joint and severally ordered to pay ABC Ltd compensation in the sum of $25,000 is modified to record that they are to pay compensation to ABC Ltd in the sum of $15,000 (section 211(a) of the Act).

(f) The order that [LAW FIRM A] cancel all its legal fees is reversed and substituted with an order that [LAW FIRM A] cancel all its fees for work covered for the period 13 December 2018 to 19 August 2019 (section 156(1)(f) of the Act).

(g) Pursuant to s 156(1)(g) of the Act, for the purposes of achieving compliance with order (f), [LAW FIRM A] is ordered to refund to ABC Ltd, any sums paid to [LAW FIRM A] by the company or Ms HY, in payment of invoices rendered on 19 February 2019, 18 June 2019, 16 July 2019, and 19 August 2019.

(h) The order that Mr SW is to pay the NZLS a fine of $15,000, is reversed and substituted with an order that Mr SW is to pay a fine to NZLS in the sum of $7,000 (section 156(1)(i) of the Act).

(i) The order that Mr GS is to pay the NZLS a fine of $5,000 is reversed and substituted with an order that Mr GS is to pay a fine to NZLS in the sum of $4,000 (section 156(1)(i) of the Act).

(j) The order directing publication of a summary of the Standards Committee determination with details of the identity of Mr SW and Mr GS (the publication decision of 29 March 2022) is reversed (section 211(a) of the Act).

(k) Mr GS, Mr SW and [LAW FIRM A] are (jointly and severally), ordered to pay the sum of $4,000 to the costs of these reviews, that sum to be paid to the New Zealand Law Society within 30 days of the date of this decision (section 210(1) of the Act).

(l) In all other respects the decision of the Standards Committee is confirmed.

DATED this 24TH day of NOVEMBER 2022

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R Maidment
Legal Complaints Review Officer

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

Mr GS as the First Applicant
[LAW FIRM A] as the Second Applicant
Mr SW as the Third Applicant
Mr KZ as the Representative for the First and Second Applicants
Mr OX as the Representative for the Third Applicant
ABC Ltd and Ms HY as the Respondents
Ms FQ and Ms TA as the Representatives for the Respondents
[Area] Standards Committee [X]
New Zealand Law Society