

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

[2022] NZLCRO 089

Ref: LCRO 120/2021

**CONCERNING**

an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006

**AND**

**CONCERNING**

a determination of [Area] Standards Committee X

**BETWEEN**

**SB**

Applicant

**AND**

**KR**

Respondent

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

**Introduction**

[1] Ms SB has applied for a review of the determination by [Area] Standards Committee X to take no further action on her complaints against Mr KR. In her application, Ms SB says that although she disagrees with the Committee's determination to take no further action on her general complaints about Mr KR,<sup>1</sup> she does not ask for these complaints to be reviewed.

[2] Her review application relates to the Committee's determination to take no further action on her complaints about Mr KR's fees and the fact that he had not sent her a letter of engagement. Nevertheless, a review involves the Legal Complaints Review Officer coming to his or her own view of the fairness of the substance and process of the Committee's determination and all aspects of Ms SB's complaints must be addressed.

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<sup>1</sup> See [10.a] supra.

## Background

[3] Ms SB was an executor of her father's estate and a beneficiary of her mother's estate. She was also a beneficiary of her father's Trust, and her mother's Trust. The firm [Law Firm A] acted for these various entities.

[4] Significant delays had occurred in administering the estates and winding up the trusts. On the recommendation of a friend, Ms SB instructed Mr KR from [Law Firm B] in July 2018 to review and advise her as to what could be done to advance matters.

[5] Ms SB terminated the firm's instructions in May 2019. During that time the firm had rendered four invoices totalling \$11,898, plus GST and disbursements.

[6] Following receipt of the firm's second invoice,<sup>2</sup> Ms SB met with Mr KR<sup>3</sup> to discuss the invoices, and to ensure that she would not be charged for work which she considered she had not instructed the firm to do.

[7] Mr KR agreed to reduce fees by \$1,000 and Ms SB then paid the balance due.<sup>4</sup>

[8] A third invoice was rendered by the firm on 31 August 2018 in the sum of \$1,191.40, which Ms SB has paid.

[9] A final invoice rendered on 30 April 2019 in the sum of \$2,165.45 remains unpaid.

## Ms SB's complaints

[10] The Standards Committee identified Ms SB's complaints as being:<sup>5</sup>

- a. Mr KR did not do what she instructed him to do, or what he stated he would do, when she and her daughter first met with him on 16 February 2018. She says that the matter was dealt with inadequately and there was a lack of action in obtaining Ms SB's inheritance;
- b. the fees Mr KR charged her are too high; and
- c. she did not receive a letter of engagement from Mr KR.

[11] Ms SB's complaints about fees are based on a detailed analysis of the firm's time records.

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<sup>2</sup> Dated 31 July 2018.

<sup>3</sup> On 17 August 2018.

<sup>4</sup> The total of the first and second invoices amounted to \$10,801.38. Ms SB paid \$9,801.38 as agreed.

<sup>5</sup> Standards Committee determination (5 July 2021) at [5].

[12] Ms SB also says:

KR further reiterated that I could recover the costs when the estate was disbursed...

[13] The outcome sought by Ms SB is to have the first three invoices rendered by [Law Firm B] assessed and further reduced, and for the fourth bill to be “assessed and determined at [the discretion of the Committee] based on [the Committee’s] overall review of [her] complaint”.

### **Mr KR’s response<sup>6</sup>**

[14] Mr KR says:<sup>7</sup>

The affairs of Ms SB’s family were complex involving trusts, estates, partnerships, debts, assets and property.

The essential issue was that Ms SB wanted to have these affairs regularised with distributions to be made to beneficiaries including herself. A law firm, [Law Firm A], acted for the various trusts partnerships and estates. Our role was to endeavour to get information and apply pressure to hurry up the process. ...

[15] Mr KR continues:<sup>8</sup>

... Given the complexity of the matter and the value of the assets concerned, our overall fee of \$11,898 was reasonable in all of the circumstances. Our final fee was certainly reasonable.

[16] He says that he “would have advised that he would have a staff solicitor (Ms DZ) prepare the file, gather the documents and analyse them and then discuss with [him]”.<sup>9</sup> He believes that Ms SB was well aware of Ms DZ’s involvement.

[17] Mr KR acknowledges that a letter of engagement was not sent to Ms SB but that otherwise he/they “complied with the requirements of the rules, including in terms of the service and fees ...” and that, “in reality, [Ms SB] has not been prejudiced by this oversight”.<sup>10</sup>

[18] In answer to Ms SB’s understanding that Mr KR had told her that she could recover fees from the estate, Mr KR says:<sup>11</sup>

... the writer may have said when discussing litigation that sometimes a litigant’s costs can be recovered from an estate. That would not have been said in any other context”.

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<sup>6</sup> Letter KR to Lawyers Complaints Service (26 June 2020).

<sup>7</sup> At [4]–[5].

<sup>8</sup> At [22].

<sup>9</sup> At [28].

<sup>10</sup> At [32].

<sup>11</sup> At [36].

### **The Standards Committee determination**

[19] The Standards Committee considered it had sufficient material to assess the reasonableness of the fees charged and members of the Committee<sup>12</sup> were familiar with the nature of the work that Mr KR was instructed to undertake. It considered that the fees charged were in order.

[20] "...the Committee was satisfied that Mr KR had handled the matter with the necessary level of competence"<sup>13</sup> and that there was no evidence of unreasonable delays that could be attributed to Mr KR.

[21] The Committee observed that the failure to send a letter of engagement had "created some confusion and misunderstanding, including in relation to the role of Ms DZ",<sup>14</sup> but that the breach of rr 3.4 and 3.5<sup>15</sup> was a "low-level technical breach". The Committee exercised its discretion to take no further action.

[22] Having addressed the issues, the Committee determined to take no further action on any of Ms SB's complaints.

### **Ms SB's application for review**

[23] Ms SB has asked for a review of the Committee's determination about Mr KR's fees and the failure to send the letter of engagement but accepts the finding in respect of the complaints detailed in [5a] of the Committee's determination.<sup>16</sup>

[24] Ms SB briefly canvasses her reasons for objecting to the level of the fees rendered, in particular the first and second invoices. She repeats her view that the costs that Mr KR had agreed would not be charged are included in the second invoice.

[25] Overall, she remains of the view that the fees are not within an acceptable range and compares the fees rendered by Mr KR to fees invoiced to her by the law firm subsequently instructed by her.<sup>17</sup>

[26] Ms SB disagrees that the failure to send a letter of engagement is a 'low-level technical' breach of the rules and that if she had received one, she would have been aware of Mr KR's hourly rate and also the fact that Ms DZ was going to be involved.

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<sup>12</sup> The members of the Committee would also include at least one lay member.

<sup>13</sup> Standards Committee determination, above n 4, at [16].

<sup>14</sup> At [17].

<sup>15</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

<sup>16</sup> See [10] above.

<sup>17</sup> [Law Firm C].

[27] The outcome sought by Ms SB is:<sup>18</sup>

...a further reduction in the first bill and a credit for the unsolicited work done by Ms DZ in the second bill...

### **Mr KR's response**

[28] Mr KR relies on his responses to the Standards Committee and I have not found it necessary to make any further enquiry of him.

### **Nature and scope of review**

[29] The High Court has described a review by this Office in the following way:<sup>19</sup>

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.

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

### **Review**

#### *Competence / timeliness*

[31] Ms SB says that she does not wish these matters to be addressed on review but as noted above,<sup>20</sup> I will briefly do so. The matters that I have been able to discern from Ms SB's complaints which fall into this category are:

- Mr KR did not achieve a 'speedy resolution' as requested by Ms SB.
- Mr KR did not 'take action' to resolve winding up the estate as quickly as possible.
- Mr KR advised her that she could recover legal fees from the estate.
- Mr KR did not identify that the farmhouse was part of her mother's estate, rather than her father's estate.
- Undertaking work without instructions.

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<sup>18</sup> Application for review (10 August 2021), step 7.

<sup>19</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

<sup>20</sup> At [2] above.

*No speedy resolution*

[32] Mr KR says that at the early stage of the firm's instructions, he emphasised the need to get information and an understanding of the matters involved. He and Ms DZ entered into extensive correspondence with [Law Firm A] to this end and pressed for proposals to achieve winding up and distribution of the estates and trusts.

[33] The Trust established by Ms SB's father (the WA Trust) vested in April 2015. Ms SB's father had died in 2001 and her mother in 2016. Ms SB herself says that she "had been unable to obtain her inheritance because her brothers would not distribute the estate and Trust in accordance with her parents' wishes".<sup>21</sup>

[34] It was agreed between her and Mr KR at the outset that litigation was a last resort.

[35] The firm's instructions spanned the period from February 2018 to May 2019. Ms SB had previously consulted another law firm<sup>22</sup> in February 2017, and this firm had been unable to progress matters.

[36] Without instructions to issue proceedings, Mr KR's only option was to press [Law Firm A] for action in the hope of convincing Ms SB's brothers that matters needed to be progressed quickly.

[37] Ms SB's brothers did not cooperate. It was beyond Mr KR's means to achieve a speedy resolution of affairs as sought by Ms SB.

*Recovery of fees*

[38] Ms SB says that her understanding she could recover legal costs from the estate had 'serious ramifications' for her because she may not have continued to instruct Mr KR for as long as she did if that was not the case.

[39] Mr KR says that he "may have said when discussing litigation that sometimes a litigant's costs can be recovered from an estate".<sup>23</sup>

[40] Any application to the Court would have included an application for costs. Mr KR did not have instructions to issue proceedings and a beneficiary of an estate or Trust does not have any absolute right to be reimbursed for costs incurred.

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<sup>21</sup> Letter SB to Lawyers Complaints Service (5 March 2020).

<sup>22</sup> YP.

<sup>23</sup> KR letter to Lawyers Complaints Service (26 June 2020) at [36].

[41] It is unknown what the present state of affairs is, but in negotiating any settlement with her brothers, Ms SB could have/can seek recovery of her costs.

#### *The farmhouse*

[42] Ms SB says that correctly identifying ownership of the farmhouse which her brothers were living in was a major issue for her as she was an executor of her father's estate whereas her brother was the executor of her mother's estate.

[43] Mr KR does not address this issue in his reply to the complaint. However, if the farmhouse is the property comprised in [Residential Address] then the letter to [Law Firm A]<sup>24</sup> correctly states that the property is/was owned by the executors of the estate of Ms SB's father. At [33] of the same letter, Mr KR/Ms DZ note that the property should be sold and held on trust for the estate of Ms SB's mother. Ms SB was aware that her brother remained executor of her mother's estate.

[44] Any misunderstanding on Ms SB's part would no doubt have been corrected had [Law Firm B] continued to act for Ms SB.

#### *Fees*

[45] Ms SB says that the objective of her complaint is to obtain a review of the fees charged by [Law Firm B] because:<sup>25</sup>

I think that these bills are too high in relation to the work that was done and that the time spent on this matter is inflated because I discovered that a junior solicitor (DZ) was doing the work and not KR who I hired as my lawyer to do the work.

[46] The [Law Firm B] invoices were calculated on the strict basis of the time recorded and Ms SB has conducted an examination of each entry. In some cases, she has challenged the amount of time recorded by the authors for each aspect of the work undertaken. For example, she notes that Ms DZ has recorded 19.46 hours to gain an understanding of the structure and entities involved with the TD family affairs as well as what Mr KR refers to as 'historic correspondence' concerning these matters. The time recorded by Ms DZ included drafting the letter to [Law Firm A]<sup>26</sup> and discussing the draft with Ms SB on several occasions.

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<sup>24</sup> 19 July 2018 at [9a].

<sup>25</sup> Letter of complaint (5 March 2020) at [3.1].

<sup>26</sup> Dated 21 May 2018.

[47] Ms SB terminated Mr KR's instructions in May 2019,<sup>27</sup> and instructed Mr HG ([Law Firm C]).

[48] Mr HG agreed to conduct an initial review of the documentation provided to him<sup>28</sup> for \$1,000. He reported to her with his comments in his letter of 24 May. Mr HG (seemingly) had the benefit of the [Law Firm B] correspondence and in particular, the 19 July letter which summarises the structure and entities involved.

[49] Sometime prior to instructing Mr KR, Ms SB had engaged YP to assist her in connection with the same issues. YP rendered a fee<sup>29</sup> of \$765 plus GST.

[50] Because of the strict reliance on the time recorded to calculate fees, and because no letter of engagement was sent, Ms SB has not been made aware that there are eight other factors to be taken into account<sup>30</sup> when assessing a fair and reasonable fee. Rather than list these here, a copy of r 9 is attached to this decision.

[51] The Committee has referred to some of these factors in its determination.<sup>31</sup>

[52] The facts involved in *Chean & Luvit Foods International Limited v Kensington Swan*<sup>32</sup> involved a similar situation to here, where the lawyer had rendered invoices on a periodic basis based upon the time recorded.

[53] Priestley J said:<sup>33</sup>

[23] It is very clear from this proper concession made by Mr Hughes that one potent circumstance is already apparent, and that is the obligation, which is clear from a number of authorities, for a practitioner who is using time and attendance records to construct a bill, to take a step back and look at the fee in the round having regard to the importance of the matter to the client, in some cases the client's means, the value to the client of the amount of work done, and proportionality between the fee and the interim or final result of the legal work being carried out. It is very clear that for most of the bills this independent assessment has not been carried out.

[54] In particular, his Honour made mention of the client's means as being a relevant factor.

[55] Mr KR met with Ms SB on 17 August 2018 and Mr KR says that the main issue raised was one of affordability.<sup>34</sup> At that meeting Mr KR says, as a gesture of goodwill,

<sup>27</sup> Mr KR says 'in or about May 2019'.

<sup>28</sup> Ms SB says that this was the same documentation she provided to Mr KR.

<sup>29</sup> 28 February 2017.

<sup>30</sup> See r 9, Conduct and Client Care Rules.

<sup>31</sup> For example, complexity and importance to client.

<sup>32</sup> CIV 2006-404-1047.

<sup>33</sup> At [23].

<sup>34</sup> Letter KR to Lawyers Complaints Service (26 June 2020) at [24].



he reduced the fees invoiced up to that time by \$1,000 and Ms SB then paid the balance outstanding immediately.

[56] So, on the one hand, Mr KR has applied only the single factor of time recorded to assess fees, but on the other, he then did make some allowance for Ms SB's ability to pay.

[57] For these reasons, it is not particularly helpful to embark on the process of examining each entry in the timesheets, endeavouring to assess whether or not the time recorded related to the work undertaken and then to continue to try to assess whether that work was even necessary, appropriate, or could have been completed more efficiently by another lawyer.

[58] Ms SB says that she does not take issue with the Committee's determination to take no further action on the complaints set out in [5a] of the Committee's determination, which results in the process described as being somewhat superfluous.

[59] Rule 9 of the Conduct and Client Care Rules provides that a lawyer must not charge a client a fee that is more than fair and reasonable for the services provided. There is no precise method of assessing what amounts to a fair and reasonable fee and consequently a degree of variation must be allowed between lawyers.

[60] The fee charged by YP was \$765. Ms SB says that she gave the same documentation to Mr KR as she had given to YP. However, it is clear that the work carried out by Mr KR and Ms DZ was significantly more comprehensive than the work undertaken by YP.

[61] The difference between Mr HG's estimate (\$2,500) and the reduced fees charged by [Law Firm B] (\$6,608) is approximately \$4,100. There was ongoing communication between [Law Firm B] and Ms SB, including several drafts of the proposed letter to [Law Firm A], and so Ms SB would have been aware of the extent of the work being undertaken, notwithstanding that a letter of engagement had not been provided.

[62] Before any reduction in fees can be ordered, there must first be a finding of unsatisfactory conduct against a lawyer. This is a serious matter and consequently it is not a finding to be lightly imposed.

[63] There is nothing to support a finding of unsatisfactory conduct in this instance.

*Undertaking work without instructions / the second invoice*

[64] Ms SB says that at the meeting with Mr KR on 17 August 2018, he agreed to reduce the firm's fees by \$1,000 and that any attendances relating to the [Residential Street] property would also not be charged. She has identified entries in the timesheets which she says relate to the [Residential Street] property and that these were included in the second invoice. She considers these fees should be refunded.

[65] In his response to Ms SB's complaints, Mr KR says that he "does not recall the [Residential Street] property being the issue it is now made out to be".

[66] The attendances identified by Ms SB for the period between 3 and 24 July 2018 form the basis for the second invoice dated 31 July 2018. Ms SB met with Mr KR on 17 August, during which Mr KR agreed a reduction in the firm's fees by \$1,000. It is logical that he considered that the agreement was in respect of the first and second invoices.

[67] Ms SB says that she had not analysed the timesheets at that time, and that it was not until afterwards that she identified entries which she says refer to the [Residential Street] property.

[68] It seems to me that there was a misunderstanding between Mr KR and Ms SB as to the reasons for reduction of the fees. The issue is therefore whether or not Ms DZ acted without instructions. The firm's instructions were to assist Ms SB to advance distribution of the trusts and estates. The proceeds of the sale of the [Residential Street] property are referred to in the financial reports provided by the accountants. To have a complete understanding of all of the matters arising out of Ms SB's instructions, it would seem to be logical to follow that issue through and was raised in the 19 July letter to [Law Firm A].<sup>35</sup>

[69] Again, there is nothing to support a finding of unsatisfactory conduct against Mr KR.

*The letter of engagement*

[70] Rules 3.4 and 3.5 of the Conduct and Client Care Rules require a lawyer to provide what is generically referred to as a Letter of Engagement. Although this will usually include a brief description of the work to be carried out, it is not a requirement of the rules. However, the rules do require that the letter of engagement include the name

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<sup>35</sup> At [21b].

and status of the persons who will be involved in carrying out the client's instructions and the basis on which fees will be charged.

[71] Most letters of engagement will refer to the hourly rates to be charged by the lawyers who will be involved in the retainer and refer to the r 9 factors.

[72] Mr KR acknowledges that a letter of engagement was not provided to Ms SB and accepts responsibility for this. He says, however, that "in reality [Ms SB] has not been prejudiced by the oversight".

[73] The Committee has referred to this as a 'low-level technical breach of the Rules'.<sup>36</sup> Ms SB disagrees. She says that if the letter had been provided, she would have known exactly what Mr KR's hourly rate was,<sup>37</sup> and that Ms DZ was to do a lot of the work. In the High Court judgment in *McGuire v Manawatu Standards Committee*,<sup>38</sup> the Court referred<sup>39</sup> to the failure of provide a letter of engagement as a 'technical breach'. The Court posed the question as being whether any 'mischief' had occurred. In that case, the letter of engagement had been provided but after significant work had been carried out, whereas the rules require the letter of engagement to be provided in advance.

[74] Ms SB is correct. She did not know Mr KR's hourly rate or, at the time of her first meeting with Mr KR and Ms DZ, that Ms DZ was going to be doing a lot of the work.

[75] Ms SB instructed the firm on 16 February 2018. Mr KR says that at that first meeting, he "would have advised that he would have a staff member (Ms DZ) prepare the file, gather the documents and analyse them and then discuss with the writer".<sup>40</sup>

[76] The difference between what Ms SB says she understood (or did not understand) and what Mr KR says, is irreconcilable. It is common practice that members of a firm work together on a file with preparatory work being undertaken by more junior staff. Mr KR retained overall management of Ms SB's affairs and there is no question that it was necessary to obtain a full and detailed understanding of the structures and entities involved as well as what had occurred over a period of some two years previously to the firm being instructed.

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<sup>36</sup> Standards Committee determination, above n 4, at [18].

<sup>37</sup> Ms SB says that it was over \$500.

<sup>38</sup> [2016] NZHC 1052.

<sup>39</sup> At [64].

<sup>40</sup> See n 8 above.

[77] It is questionable whether Mr KR could have completed the work that Ms DZ undertook in half the time taken by Ms DZ.

[78] I cannot identify any 'mischief' occurring in this case.

[79] The question that also arises in the circumstances, is whether a finding of unsatisfactory conduct should be made on the basis of the breach of this rule alone. Whilst it is not the case that a finding of unsatisfactory conduct will never be made following the breach of a single rule, it is invariably the case where the breach is serious and offends against the fundamental tenets of the Lawyers and Conveyancers Act 2006.

[80] In *Wilson v LCRO*,<sup>41</sup> Hinton J commented on the application of the rules. She said:

The rules are to be applied as specifically as possible. In my view, they are also to be applied as sensibly and fairly as possible. These are practice rules not a legislative code.

...the rules should not be applied in an unduly technical manner. The conduct alleged should clearly offend. A finding of unsatisfactory conduct is a serious matter.

...there is a difference between unsatisfactory conduct ...and excusable slippage.

[81] Finally, in *Deliu v Hong*,<sup>42</sup> the Court commented:

...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.

[82] The description of the breach of rr 3.4 and 3.5 as a low-level technical breach implies that provision of the required information is of minimal importance. That is not the case but, in the particular circumstances here, and for the matters discussed above, I do not consider that an adverse response is warranted on the basis of this single breach of the rules.

## Decision

[83] Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the determination of the Standards Committee to take no further action on Ms SB's complaints is confirmed.

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<sup>41</sup> [2016] NZHC 2288 at [43]–[44] & [49].

<sup>42</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [41].

**Anonymised publication**

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

**DATED** this 03<sup>rd</sup> day of AUGUST 2022

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**O Vaughan**  
**Legal Complaints Review Officer**

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

Ms SB as the Applicant  
Mr KR as the Respondent  
Mr ON as a related person  
[Area] Standards Committee X  
New Zealand Law Society