LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 135

Ref: LCRO 15/2021

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a decision of the [Area] Standards Committee [X]
BETWEEN	**JBC Limited** Applicant
AND	**KD** Respondent

DECISION

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

Introduction

[1] On behalf of JBC Limited (JBC), Mr LE has applied to review a decision by the [Area] Standards Committee [X] (the Committee) dated 23 December 2020, in which the Committee decided to take no further action on JBC's complaints about its former lawyer, Mr KD.[1]

[2] The Committee based its decision upon s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). This allows a Committee to dismiss a complaint at an early stage, if it considers that further action on it is neither necessary nor appropriate.

[1] For ease of reference in this decision, I will refer to Mr LE as the applicant, rather than to JBC Limited.

Background

[3] At the relevant time, JBC owned a large block of land in [City]. Another company, PHL, owned land immediately next door.

[4] Access to PHL's land (and other neighbouring properties) was by way of a pre-existing right-of-way over JBC's land. JBC and another neighbour had been endeavouring to negotiate an alternative right-of-way arrangement providing better access to all of the properties in the immediate vicinity.

[5] Both JBC and PHL had plans to subdivide and develop their land.

[6] The [City] District Council (the Council) granted PHL a subdivision consent, on a non-notified basis. The subdivision consent included PHL's continuing use of the existing right-of-way.

[7] The director and shareholder of PHL was a senior [City] lawyer, Mr Z. He contacted Mr LE and told him about the non-notified subdivision consent, including the continued use of the existing right-of-way.

[8] Mr LE had concerns about the Council's subdivision consent, particularly in regard to the right-of-way. He wanted the consent overturned in some way.

[9] Mr LE consulted his usual lawyer about the issue, a Mr MF, who in turn referred Mr LE to Mr KD, who is a recognised expert in [City's] in resource management matters.[2]

[10] Mr KD's view was that there were potential grounds for a judicial review of the Council's subdivision consent, particularly in relation to the non-notified basis upon which the Council treated PHL's subdivision application.

[11] Mr KD advised Mr LE that because the Council had issued the subdivision consent on a non-notified basis, the only available challenge was by way of judicial review.

[12] Mr KD was instructed to issue judicial review proceedings. As well, other interlocutory steps were taken in an effort to preserve JBC's position.

[2] Mr KD was, at the material time (and remains), a director in another incorporated law firm in [City].

[13] The judicial review proceedings were heard in the [City] High Court in [month] 2018, with judgment issued on [Date] 2018 (the judicial review decision).[3] JBC was unsuccessful and was ordered to pay the Council's costs.

Complaint

[14] Mr LE lodged his complaint with the New Zealand Law Society Complaints Service (the Complaints Service) on 11 August 2020. He said:

(a) He sought advice from his usual lawyer, Mr MF, in connection with a shared right-of-way and its effect on a property development project on JBC's land.

(b) Mr MF referred Mr LE to Mr KD.

(c) Mr KD convinced Mr LE that the Council's actions were incorrect; "i.e. the law was not followed."

(d) Mr LE was particularly concerned that Mr Z had apparently given advice to the Council, but Mr KD was reluctant to pursue that point.

(e) No advice was given about litigation risk and the possibility of loss.

(f) As a consequence of losing the case, JBC had to pay costs to the Council of $26,000; this on top of $18,237.50 in fees it had already paid Mr KD.

(g) Mr KD made no contact after issuing his last invoice, until his business partner, 20 months later, issued a letter of demand for the balance of legal fees owing.

[15] Following a request from the Complaints Service, Mr LE provided copies of Mr KD's invoices as well as a copy of the judicial review decision.

Response

[16] In a letter to the Complaints Service dated 31 August 2020, Mr KD provided a comprehensive response to Mr LE's complaint. After setting out the relevant factual, procedural and legal background, Mr KD said:

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[3] *(JBC) Ltd v [City] Council* [2018] NZHC [XXXX].

Instructions

(a) The issue in the judicial review proceedings was not Mr Z's role, it was to challenge the subdivision consent issued by the Council.

(b) Despite that, Mr LE may have had good cause to feel duped by Mr Z, particularly as they had been in discussion about access to all of the properties. It appears that whilst those discussions were taking place, Mr Z was also pursuing his company's subdivision consent which included making use of the existing right-of-way.

(c) Mr KD gave Mr LE, and Mr LE's lawyer Mr MF, a copy of the pleadings before they were filed. This included Mr LE's affidavit, in which there was extensive reference to the right-of-way discussions between Mr LE and Mr Z.

(d) Mr KD promptly dealt with any of Mr LE's queries and received clear instructions from Mr LE to lodge the judicial review proceedings.

(e) Litigation risk was discussed, as well as the fact that judicial review proceedings involve the exercise of a discretionary remedy by the court.

Fees

(f) The legal work included an application for an injunction, an application to prevent a caveat from lapsing as well as the judicial review proceedings. All steps were "vehemently opposed".

(g) Total legal fees were $33,660 plus GST and disbursements, making a total of $41,561.50. This compares with scale costs in the High Court Rules 2016 (category 2B proceedings) of $40,913. This does not include the injunction and caveat proceedings.

[17] Mr KD noted that "this matter involved substantial legal proceedings and the file is extensive." He said that he was "happy to provide a full copy of all of the legal proceedings if required."

[18] Mr KD supplemented his response to Mr LE's complaint by attaching his firm's letter of engagement, some correspondence that had been exchanged as well as a copy of Mr LE's affidavit in the judicial review proceedings.

Comment by Mr LE

[19] In a letter to the Complaints Service dated 27 October 2020, Mr LE offered the following comments about Mr KD's response:

(a) As well as Mr KD's legal fees, JBC was required to pay the Council's costs in the judicial review proceedings. The Council had been represented by a QC, and the costs were $25,975.[4]

(b) As at October 2020,JBC had only paid $18,237.50 of the invoices issued by Mr KD. Therefore, it had paid out a total amount of $44,215.50 which Mr LE described as "a massive and a not foretold result."

[20] In further comment in an email to the Complaints Service dated 17 November 2020, Mr LE said that Mr KD had "never outlined costs of losing in court or any likelihood of that occurring."

[21] Mr LE also referred to a comment made by the judge in the judicial review decision, to the effect that the issues involved "well-settled law", but that this was inconsistent with the advice that Mr KD had given.

Standards Committee decision

[22] The Committee identified the following issues to be determined:[5]

(a) Did Mr KD breach any of his professional obligations to Mr LE in the services he undertook for JBC?

(b) Did Mr KD charge a fee that was more than fair and reasonable?

Breach of professional obligations?

[23] There were two parts to this issue of complaint. First, that Mr KD did not raise issues about Mr LE's neighbours as part of the judicial review proceedings, and secondly that Mr KD's professional lapses caused a loss to JBC which included having to pay the Council's legal fees.

[24] As to the issue concerning Mr LE's neighbours, the Committee observed that first, the judicial review proceedings concerned the Council's conduct, and secondly, in any event, Mr LE had described the conduct in his affidavit.

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[4] This amount being the $26,000 previously referred to.
[5] Standards Committee determination dated 23 December 2020 at [5].

[25] The Committee was satisfied that Mr KD had not breached any of his professional duties to Mr LE "in relation to his advice on the litigation options and his approach to the judicial review."[6]

Fees

[26] In considering this issue, the Committee satisfied itself that "it had members … with the requisite experience and expertise to assess the reasonableness of the fees in this case."[7]

[27] The Committee turned its attention to the reasonable fee factors set out in r 9.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[28] It noted that the retainer included Mr KD issuing judicial review proceedings, as well as preparing an interlocutory application for an injunction and an originating application to prevent a caveat, lodged by JBC, from lapsing. All of those proceedings were opposed.

[29] Against that background, the Committee described the litigation as "quite extensive and would have required preparation as well as the undertaking [of] each of the proceedings." As well, Mr KD "was a very experienced resource management practitioner and therefore had the requisite skill and experience to undertake the litigation."[8]

[30] The Committee also held that the litigation was of importance to Mr LE and, although unsuccessful, carried with it risk normally associated with litigation. It also noted that "there was a degree of urgency."[9]

[31] Finally, the Committee "observed that Mr LE had not complained to Mr KD regarding the costs and submitted [the] complaint … some two years after the High Court decision and close to two years after the final invoice was issued." The Committee's conclusion was that Mr KD's fees were fair and reasonable.[10]

Review Application

[32] Mr LE filed his application for review on 28 January 2021. He said:

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[6] At [9].
[7] Standards Committee determination at [10].
[8] At [12].
[9] At [12].
[10] At [13].

(a) Mr KD's advice was incompetent and he also "shielded a fellow lawyer."

(b) In its judgment, the High Court described the law as being "well-settled" yet Mr KD's advice was that the Council had acted outside the law.

(c) Further, the High Court observed that JBC had not identified any error on the part of the Council.

(d) Mr KD did not advise about litigation risk. He "totally represented that [the Council] was wrong and did not suggest other than go to court."

(e) Mr LE complained about fees to Mr KD's partner.

(f) Mr LE believed that Mr KD had written-off his fees, but when he received a letter of demand from Mr KD almost two years after the final invoice had been issued, he decided to lodge his complaint.

(g) The Committee's arithmetic appears to be that fees of $44,000 were fair and reasonable. That amount is made up of $18,000 being Mr KD's fees, and $26,000 in costs payable to the Council as a result of the unsuccessful litigation. Mr LE would (reluctantly) accept this. However, Mr KD still claims the unpaid balance of $23,000 which means that total fees were $67,000. Mr LE does not agree to pay that balance.

[33] Mr LE emphasised that Mr KD "was clear that the [Council] had erred", and that "he professed to be something of a specialist in this area of law."[11]

Response by Mr KD

[34] In a Memorandum dated 19 February 2021, Mr KD submitted:

(a) The Committee's decision "was correct as a matter of fact and law" and was "an appropriate exercise of [its] discretion."

(b) Mr LE, and his solicitor Mr MF, were fully informed of all options, including risks.

(c) Mr LE's complaint was lodged almost two years after the final invoice was issued. Costs charged were less than the High Court Rules' costs scale, and no issue was raised by Mr LE at the time.

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[11] Mr LE's email to LCRO (21 April 2021).

Review on the papers

[35] This review has been undertaken on the papers pursuant to s 206(2) of the Lawyers and Conveyancers Act 2006 (the Act), which allows a Review Officer to conduct the review on the basis of all information available if the Review Officer considers that the review can be adequately determined in the absence of the parties.

[36] In anticipation of that process being followed, on 6 April 2021, the parties were given an opportunity to make submissions as to whether they wished Mr LE's review application to proceed by way of a hearing in person, or a hearing on the papers.

[37] The parties were advised that a lack of any response would be regarded as consent to the hearing proceeding on the papers.

[38] In an email to the Case Manager dated 22 April 2021, Mr KD indicated that he was "happy for the matter to be considered [on the papers] and in any event will abide the decision of the Review Officer in that regard."

[39] In an email to the Case Manager dated 25 April 2021, Mr LE said that he had "neither the ability to appraise 'the papers' option nor wish to allot time to what appears wasted effort …" and that he "trusts [that the Legal Complaints Review Officer] restores [his] faith in justice by whatever means."

[40] I have taken this to mean that Mr LE has no objection to his review application being considered on the papers.

[41] On the basis of the information available, I have concluded that the review may be adequately determined on the papers and in the absence of the parties. The Case Manager informed the parties of this in an email dated 28 April 2021.

[42] I record that having carefully read the complaint and response, the Committee's decision and the submissions filed in support of and in opposition to the application for review, there are no additional issues or questions in my mind that necessitate any further submission from either party.

Nature and scope of review

[43] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[12]

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

> … the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.
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> The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
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> … 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.

[44] More recently, the High Court has described a review by this Office in the following way:[13]

> 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.

[45] 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.

Discussion:

Issues

[46] I have identified the following conduct issues:

(a) Did Mr KD represent JBC competently, consistent with the terms of the retainer and the duty to take reasonable care?

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

(b) Relatedly, did Mr KD take reasonable steps to ensure that Mr LE understood the nature of the retainer, including consulting with him about the steps to be taken to implement Mr LE's instructions?

(c) Were the fees charged by Mr KD, fair and reasonable?

[47] I will discuss each in turn.

Competence and consultation

[48] As I read Mr LE's complaint and review application, he is, in essence, suggesting that Mr KD failed to provide competent advice both as to the law and litigation risk.

[49] This also engages a consideration of whether Mr KD made sure that Mr LE understood the nature of the retainer and consulted with him about steps to be taken.

[50] As evidence of poor advice about the law, Mr LE points to a passage in the judicial review decision in which the judge referred to the Council's approach to JBC's subdivision consent as involving the application of "well-settled law, soundly based as a matter of statutory interpretation."[14]

[51] As to advice about litigation risk, Mr LE said that this advice was simply not given.

[52] As he put it in his email to the Complaints Service sent on 17 November 2020, "why would we go to court if well-settled law said we would waste our time."

[53] These issues of complaint engage rr 3 and 7.1 of the Rules, which relevantly provide:

> 3 In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.
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> 7.1 A lawyer must take reasonable steps to ensure that a client understands the nature of the retainer and must keep the client informed about progress on the retainer. A lawyer must also consult the client … about the steps to be taken to implement the client's instructions.

[14] *JBC Ltd v [City] District Council,* above n 3, at [49].

Litigation risk

[54] Dealing first with the question of advice about litigation risk, a partial answer to this ground of complaint is to be found in Mr KD's email to Mr MF, dated 23 May 2017, in which Mr KD said the following:

> Judicial review is a discretionary remedy and delay can result in being penalised in the end result so if [JBC] want to move they need to do so promptly.

[55] It bears noting that this was correspondence sent by Mr KD, to Mr LE's solicitor, Mr MF. I have no doubt that Mr MF would have sent a copy of that email to Mr LE or would have discussed its contents with him.

[56] I am confident that Mr MF, as a lawyer, would have appreciated Mr KD's reference to judicial review being a "discretionary remedy" and would have explained to Mr LE precisely what that meant.

[57] Self-evidently, it means that a result can never be guaranteed. This is another way of describing of litigation risk.

[58] Moreover, I consider that it would have been reasonable for Mr KD to assume that Mr MF would discuss that issue with Mr LE.

[59] One week later, on 30 May 2017, Mr KD met with Mr LE and Mr MF. Amongst other things, they discussed the nature of judicial review proceedings and Mr KD said that he referred again to the discretionary nature of judicial review remedies.

[60] I accept what Mr KD says about this.

[61] It presents as being unlikely that Mr KD would refer to the discretionary nature of judicial review remedies in his 23 May 2017 email, yet omit any reference to that in a discussion – including with a lawyer – one week later when once again there were discussions about judicial review proceedings.

[62] Although not specifically addressed by Mr KD in his submissions, I accept that he would also have referred to the fact that unsuccessful litigants are invariably required to pay costs to the successful party, although generally on a scale basis rather than on a full recovery basis.

[63] I assume also that this would have been discussed between Mr LE and his own solicitor, Mr MF.

[64] It is a conventional discussion for a lawyer to have with their client about any type of litigation that their client is considering embarking upon. Exposure to costs is an important litigation risk factor, well understood by lawyers who practise in courts and tribunals.

[65] Further, in his email to Mr LE sent on 2 November 2017, Mr KD said the following:

> [T]he judicial review jurisdiction is about the process that was followed to reach a decision, not the merits of the decision itself. So we don't have to prove that the decision itself was wrong. We have to show that they only considered environmental effects, not the effect on you as affected persons, that they didn't actually make a decision on notification and that they took into account irrelevant considerations and [ignored] relevant ones.

[66] I do not read that email as Mr KD indicating that the judicial review proceedings would succeed or were even likely to succeed. That email sets out accurate and measured advice about the process. It must be read together with his 23 May 2017 email to Mr MF and the follow-up meeting one week later, in which he referred to the discretionary nature of judicial review remedies.

[67] Mr KD describes himself as having close to 30 years' experience as a resource management lawyer. He said that this has included advising both ratepayers, such as Mr LE/JBC, as well as Councils.

[68] I accept that Mr KD is an experienced resource management lawyer.

[69] It is reasonably well understood that the resource management jurisdiction engages frequently with judicial review. Lawyers familiar with judicial review jurisprudence well understand that remedies in that jurisdiction are entirely discretionary.

[70] I am quite satisfied that Mr KD has, and had at the time, that understanding. It would simply not be possible to devote that many years of legal practice to judicial review jurisprudence and emerge unaware of judicial review's discretionary underpinning.

[71] I am completely satisfied that Mr KD advised both Mr LE and Mr MF about the discretionary nature of judicial review remedies, and that this was a discussion about litigation risk which included advice about the costs risk if unsuccessful.

[72] Mr LEs' rhetorical question asking why he would go to court if the law was well-settled, is one advanced with the benefit of hindsight. This is because he has repeated the expression used by the judge in his judgment.

[73] Legal principles are well-settled across many areas of the law. However, the issues in a significant number – perhaps the majority – of cases turn on the application of those principles to disputed areas of facts.

[74] In this case, an added factor was the discretionary nature of judicial review remedies. "Well-settled law" does not readily translate into "the case will be lost."

[75] Whilst I do not doubt that Mr KD's advice about litigation risk was appropriately detailed, I would observe that this issue of complaint could have been avoided if Mr KD had recorded his advice in writing – including as to costs exposure – and provided this to Mr LE (and Mr LE's solicitor, Mr MF). He went part-way there with his initial email to Mr MF of 23 May 2017. However, he ought to have done so more comprehensively after the meeting with Mr LE and Mr MF one week later.

[76] No conduct issues turn on this; I am satisfied that Mr KD gave sufficiently detailed advice about the retainer as required by r 7.1 of the Rules.

Competent advice

[77] Mr LE's position is that Mr KD left him in no doubt that the Council's subdivision consent processes were flawed, and that the judicial review proceedings would succeed as a result.

[78] Mr LE points to the judge's comment in his judicial review decision, describing the Council's approach to the subdivision consent as involving the application of "well-settled law, soundly based as a matter of statutory interpretation".[15] He has also referred to a submission Mr KD made attempting to draw a distinction on a particular point, as not having "any practical impact."[16]

[79] A useful starting point when addressing a complaint that a lawyer's advice about litigation was incompetent, is to consider any rulings, directions or decisions made by the court or tribunal which has dealt with the litigation.

[80] Judges and other decision-makers can generally be expected to make some comment about the way in which a case has been conducted by a lawyer, if the lawyer's conduct has revealed shortcomings in their advice or advocacy.

[81] It is well understood that judges and other decision-makers are better placed than anybody else, to assess a lawyer's conduct in proceedings.

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[15] *JBC Ltd v [City] District Council*, above n 3, at [49].
[16] At [45].

[82] Mr LE has submitted that the comments made by the judge about legal principles being "well-settled" is a clear indication that the judge considered that Mr KD's arguments to the contrary, lacked merit and were never going to succeed.

[83] I disagree.

[84] It is trite to observe that almost every decided case will produce a successful outcome for one party, and an unsuccessful outcome for the other. This is a hallmark of the adversarial system. Cases are argued, and the decision-maker decides which case has the greatest factual and legal merit.

[85] Not infrequently, first-instance decision-makers are subsequently held to be wrong in their assessment, by an appellate body.

[86] This is also a feature of an adversarial system of dispute resolution – a hierarchy of courts.

[87] It goes without saying that just because an appellate body disagrees with an earlier decision in the case, it does not follow that the earlier decision-maker has been incompetent.

[88] The comments made by the judge in the judicial review decision about the legal principles being "well-settled" present as entirely conventional remarks made by a judge during the course of considering competing arguments, and arriving at a conclusion about those arguments. The comments do not, even impliedly, indicate the judge's view that Mr KD's argument was entirely without merit and ought never to have been brought.

[89] Moreover, a careful reading of the judicial review decision gives indication that it was a hard-fought battle, with the judge carefully setting out each side's competing arguments and giving them appropriately due consideration.

[90] Further, as is entirely customary, because JBC was the losing party, it was required to pay the Council's costs. Any suggestion that the way in which JBC presented and argued its case contributed to the length of the proceedings or is otherwise without merit, would have been reflected in the judge's costs award.

[91] I note that the judge's decision about costs was, again entirely conventional, on a 2B basis in the High Court Rules.[17] That scale does not include any uplift allowance to reflect the way in which the losing party has conducted the case.

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[17] *JBC Ltd v [City] District Council*, above n 3, at [70].

[92] There is no substance to Mr LE's complaint that Mr KD's advice, or indeed his conduct of the proceedings, lacked the required level of competence. To the contrary, and despite the fact that JBC was unsuccessful, at least from the judicial review decision, it appears that Mr KD's representation was meticulous.

Fees

[93] I have considerable reservations about the Committee's approach to considering Mr LE's complaint about Mr KD's fees.

[94] As a preliminary observation, I do not accept Mr LE's argument that the costs that JBC was ordered to pay the Council, should be factored into an assessment of whether Mr KD's fees were fair and reasonable.

[95] Those costs were ordered by the High Court, and they naturally followed the fact that JBC was unsuccessful in the judicial review proceedings. I have already held that there is no room for saying that JBC lost because of any failure by Mr KD to provide competent representation.

[96] The question of Mr KD's fees is confined to just that: invoices issued by him.

[97] As a first point, I observe that this was a retainer of some 15 or so months, beginning in mid-May 2017.[18] The last invoice apparently issued by Mr KD is dated early August 2018.

[98] This information is relevant to a fees assessment but is not readily apparent from the Committee's decision, as might reasonably be expected.

[99] As well:

(a) A cost assessor was not appointed.

(b) The Committee did not request Mr KD's files and inspect them.

(c) Its decision did not identify how many invoices were issued, the total of those invoices and how much had been paid towards the total legal fees.

[100] In responding to the complaint, Mr KD provided a reasonably comprehensive explanation, and attached a handful of correspondence and a copy of Mr LE's affidavit.

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[18] Although Mr KD's letter of engagement was not issued until 4 July 2017, I am satisfied that Mr KD was engaged in giving advice about the matter from May 2017,

[101] Mr KD also drew a comparison between the fees that he charged, and the High Court Rules' 2B scale, which produces an outcome very similar to the fees he charged, yet those fees included two other sets of proceedings (injunction and caveat) not provided for in the relevant scale.

[102] The Committee referred to those other proceedings. However, despite Mr KD offering to provide the Committee with a set of the proceedings he filed, the Committee did not make that request of him.

[103] Boiled down to its essence, the Committee's assessment of Mr KD's fees was based on observations about its expertise in considering matters of this nature. From there, the Committee's analysis of the fees evidence is limited to two to three paragraphs of general statements about the nature of the proceedings. There is no apparent analysis of invoices, and there are no conclusions based upon analysis and reasoning.

[104] For example, the Committee does not address Mr KD's submission about the synergy between his fees, and the 2B scale in the High Court Rules.

[105] Reasoning and decision-making in fees complaints should not be based upon a helicopter view of a retainer and the fees charged.

[106] There is no substitute, for any decision-maker, for a proper evaluation of all evidence, followed by transparent reasoning as to the acceptance or rejection of evidence, and a clearly expressed conclusion anchored in legal or regulatory principles applied to the evidence.

[107] Anything less presents as superficial, and in a disciplinary jurisdiction, leaves room for a lay-person to conclude that their complaint has not been taken seriously.

[108] At a minimum, a Standards Committee's decision or determination about a fees complaint should identify the amount of fees that have been charged, any disbursements, and the GST component. If more than one invoice has been issued, then a table should be prepared setting out the details of each invoice.

[109] There must be clear evidence that the Committee has turned its mind to each invoice issued, and to whether the fee charged in that invoice fairly and reasonably reflects the legal work undertaken and to which the invoice relates.

[110] I emphasise that the Committee's conclusion that Mr KD's fees were fair and reasonable, may be correct. Indeed, at first blush, those fees do not appear excessive. I am mindful, for example, of Mr KD's comparison between his fees with the High Court Rules scale.

[111] However, although a very useful starting point, it is not necessarily a determinative factor. A lawyer's fees must still be measured against rr 9 and 9.1 of the Rules, with the fundamental principle being that the fee must be "fair and reasonable for the services provided, having regard to the interests of both client and lawyer."

[112] A similar issue arose recently in a review application considered by Review Officer Maidment.[19] He said the following:

> [231] A feature of the Committee's fee analysis is that it references r 9.1 factors, but provides minimal explanation as to why the factor referenced assumes significance.
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> [232] Having carefully considered the analysis proffered, I am not persuaded that the Committee's reference to the fee factors addressed, sufficiently (in the absence of further explanation) addresses the question as to whether fees charged were fair and reasonable.
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> [233] The factors set out in r 9.1 provide useful guidance for a Committee, but simple explanation that a particular fee factor has been considered, is not in itself sufficient to establish the relevance of the factor to the fee.
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> [234] There may be circumstances where it is adequate to simply reference the fee factors relied on, but in others it will be necessary to provide more comprehensive explanation in order to ensure that the complainant fully understands the reasoning that has gone into the decision-making process.
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> [235] Reference to a r 9.1 factor may have little meaning for a complainant in the absence of explanation as to why the factor was considered significant.
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> [236] The simple citing of a r 9.1 factor does not necessarily imbue the factor with any particular significance or relevance for the fee enquiry.
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> [237] Whilst the r 9.1 factors provide a helpful architecture around which a comprehensive fee analysis can be constructed, it is important that Committees do not lose sight of the need to step back and look at the fee in the round.
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> [238] It has been observed that lawyers have an obligation when billing to:
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> > … 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.
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> [239] I am not satisfied that the scope of the Committee's inquiry, as reflected by its decision, was sufficiently comprehensive.
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> [240] My colleagues and I have observed in recent times, when considering review applications arising out of fees complaints, that Standards Committees are increasingly undertaking a "fair and reasonable" assessment – sometimes involving substantial fees – without the benefit of input from a cost assessor.
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> [241] There is no requirement that a Committee appoint an assessor. A Committee may (particularly a specialist Committee) consider that it has sufficient

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[19] *VM v XZ* [2020] NZLCRO 216. Citations are omitted. The Review Officer was considering fees of a little under $257,000.

> and relevant expertise amongst its membership, to consider the fee complaint itself.
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> [242] However, where fees under consideration are this significant, it seems to me that the appointment of a cost assessor is not only worthwhile, but critical to the assessment that a Committee must ultimately make about a challenged fee.
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> [243] There are considerable benefits in having an independent cost assessor appointed in circumstances where the fee complained of is this substantial. A cost assessor's report can be particularly valuable in circumstances where the complaint concerns litigation costs.
>
> [244] Informed from a background and expertise in the area of litigation engaged by the complaint, an experienced assessor is able to provide both accurate assessment as to the range of costs that would be reasonably incurred for litigating the case, and an informed calculation as to whether costs incurred which appear to have exceeded what would conventionally have been expected, present as reasonable.
>
> [245] A cost assessor will meet with the parties.
>
> [246] The assessor prepares a report for the Committee.
>
> [247] That report is copied to the parties, and opportunity provided for the parties to comment.
>
> [248] It is a process that allows for more direct input from the parties and is likely, in my view, to heighten confidence particularly for complainants, that their concerns have been adequately addressed.
>
> [249] Of course, it remains the function of a Standards Committee to ultimately decide whether fees charged are fair and reasonable. An assessor's report may be accepted or rejected in whole or in part by the Committee; that is the prerogative of any decision maker when considering evidence that has been provided.
>
> [250] At the very least however, an assessor's report and the parties' comments about that report will greatly assist a Committee with its task of ruling on the fairness and reasonableness of a lawyer's fee.
>
> [251] It bears repeating, that this was a substantial fee.
>
> [252] I emphasise that I have not concluded that the fee in this case was unreasonable, rather that the Committee's decision provides insufficient evidence of it having adequately considered the question as to whether the fee charged was fair and reasonable in the circumstances.
>
> [253] It is regrettable that resolution of this matter will be delayed, but I do not consider that I am, in the circumstances, well placed to determine whether the fee is fair and reasonable.

[113] Further, the New Zealand Law Society's *Practice Note Concerning the Functions and Operations of Lawyers Standards Committees* (Practice Note) has the following to say about fees complaints (citations omitted):

> 10.3 Fees complaints should be delegated by Standards Committees either to a specialist costs assessor appointed for that purpose by the NZLS Complaints Service or to an individual Standards Committee member. The

> delegation should be in writing. The costs assessor or Standards Committee member must undertake an analysis of the bill of costs and the client file and prepare a report for the Standards Committee. It is expected that the costs assessor would arrange a meeting with the lawyer and the complainant together, with the necessary files and costing records being made available, as part of the investigation.
>
> 10.4 The costs assessor's report should refer to the following matters:
>
> (a) Whether the costs assessor considers that the fee is fair and reasonable for the services provided in terms of Rule 9 and, if not, the costs assessor should express an opinion:
>
> (i) Concerning a fee which is fair and reasonable; or
>
> (ii) A range within which a fee would be considered fair and reasonable.
>
> (b) Whether anything else emerged from the inquiry which the costs assessor considered to be relevant for the purpose of assisting the Standards Committee with its inquiry into the fee complaint.
>
> …
>
> 10.6 The costs assessor's reports should be copied to the parties, with an opportunity to respond. …

[114] I accept of course that these are guidelines only, and do not carry the force of regulation. Even so, the good sense in what the guidelines recommend is tolerably clear.

[115] I should make it clear that I am not saying that in every case of a fees complaint, a Standards Committee should appoint a costs assessor or form a sub-committee to carry out that function. Whether to do so is a matter of judgement, to be exercised on a case-by-case basis.

[116] But it is reasonable to suggest that a complaint about legal fees in the region of some $37,000 involving three separate (though interrelated) sets of proceedings in the High Court, should trigger at a minimum a request for the lawyer's file, if not, the appointment of a costs assessor.

[117] I should add that my reference above to fees of some $37,000, has been arrived at by me reviewing the Standards Committee's file (such as it is), and adding up the invoices which were provided by Mr LE. I have no way of knowing whether Mr LE provided a complete set of invoices, however this figure seems broadly consistent with the amount referred to by Mr KD.

[118] As a Review Officer, whose statutory function is to consider material that was before a Standards Committee and carry out an independent assessment of its methodology, reasoning and conclusions, I am not prepared to conduct what would in

effect be a first-instance consideration of the fees charged by Mr KD. I say "first instance", because the Committee's approach was so superficial as to be of very little assistance to Mr LE or to me.

[119] Because mine would effectively be a first-instance fees assessment, this would deprive the parties of the relatively benign review rights from Committee decisions and determinations to Review Officers. Disagreement with my fees assessment would require the aggrieved party to embark upon the much more proscriptive (and costly) judicial review procedure under the Judicial Review Procedure Act 2016.

[120] For that reason, I propose to refer Mr LE's fees complaint back to the Committee, with a direction for it to reconsider that complaint.

[121] I do not propose to direct the Committee to appoint a costs assessor. I will however direct the Committee to call for Mr KD's files – pleadings and otherwise – including requesting copies of all invoices issued by Mr KD. Although Mr LE provided invoices as part of his original complaint, as I have explained above it is not entirely clear to me whether this is a complete set.

[122] That being said, having received Mr KD's files and having reviewed those files as part of its inquiry into whether the fees charged were fair and reasonable, I would expect the Committee to turn its mind to whether it may be necessary to appoint a costs assessor and, if the decision is made not to do so, then some explanation is given for that step.

[123] Finally, I acknowledge that the fees to which this matter relate, were incurred between three and four years ago (although I note that Mr LE did not lodge his complaint until August 2020). On any analysis, this matter now has a lengthy history and neither party's interests are served by allowing a matter to drag on.

[124] Equally, in my view, the parties' interests will not be properly served by me undertaking a first-instance fees assessment, in circumstances where that is properly the function of a Standards Committee, and one which was not adequately carried out on this occasion.

[125] It follows that the Committee's decision that the fees charged by Mr KD were fair and reasonable must be reversed, and the issue considered afresh.

Decision

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

(a) confirmed as to the decision to take no further action on the complaint issues of competence and consultation; and

(b) reversed as to the finding that the fees charged by Mr KD were fair and reasonable.

[127] Pursuant to s 209(1)(a) and (b) of the Act, the Committee is directed to:

(a) reconsider Mr LE's complaint that the fees charged by Mr KD were neither fair nor reasonable;

(b) as part of that inquiry, to call for Mr KD's complete files including copies of invoices issued by him; and

(c) to consider whether to appoint a cost assessor in accordance with the Practice Note referred to in [109] above.

Anonymised publication

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

DATED this 24th day of August 2021

____

R Hesketh
Legal Complaints Review Officer

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

Mr LE on behalf of JBC Limited as the Applicant
Mr KD as the Respondent
NG as a Related Person
[Area] Standards Committee [X]
New Zealand Law Society