LCRO 316/2013

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [City] Standards Committee [X]
BETWEEN	**DV, RL, YS AND TB** Applicants
AND	**AW** Respondent

DECISION

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

Introduction

[1] The applicants have applied for a review of a decision of the [City] Standards Committee [X] in which the Committee determined to take no further action in respect to their complaints against Mr AW.

Background

[2] In November 2005, Mr AW received instructions to act for eight shareholders of the DEF Ltd.

[3] DEF Ltd, a company formally registered in the [Overseas Country], was operating a business in New Zealand which assisted [[Overseas]] citizens obtain permanent residence in New Zealand.

[4] The company sought to take advantage of an immigration scheme promoted by the New Zealand Government, which provided incentives for potential immigrants to establish themselves in New Zealand, with the ultimate objective of securing New Zealand residency. Potential immigrants who had the financial capacity to invest $100,000 in New Zealand based investments could, in so doing, secure an advantageous consideration of their applications for permanent residency.

[5] DEF Ltd promoted investments in Wellington real estate. Those investments failed, resulting in a loss to the DEF Ltd investors of around $10-15 m.

[6] The management of the company's affairs was problematic, and characterised for a period of time by factional disputes. There had been discord among the shareholders and, it seems, a number of changes in the makeup of the board of directors. There was disagreement as to which individuals were legitimate shareholders in the company.

[7] In 2000 the DEF Ltd directors determined to cease trading in New Zealand, to realise the company assets and to return the assets in cash to the shareholders.

[8] When funds were dispersed, Mr AW's clients were not paid out. It was alleged that they were not shareholders in the company. Mr AW was instructed to challenge the director's decision not to recognise his clients as legitimate shareholders.

[9] Proceedings were commenced. The litigation was lengthy, complex, and ultimately successful. The Court held that Mr AW's clients were shareholders, and determined that each of his clients was entitled to receive payment in the sum of $132,307.77.

[10] On 22 September 2009, Mr AW rendered his account. Total fees rendered, inclusive of GST and costs, were $522,492.19. The fee, to be equally apportioned between each of the eight clients, was comprised of a base fee of $309,625 plus GST ($356,068.75) and an additional fee (described in Mr AW's reporting letter as an "adjustment fee as agreed") of $174,164.03, GST inclusive.

[11] The adjustment fee had been charged by Mr AW on grounds that he had conducted the litigation on a contingency basis, and it had been agreed by his clients at commencement that he was authorised to charge an uplift on his base fee if he achieved successful outcome.

[12] At conclusion of the litigation, Mr AW reported to his clients, sought assurances that his legal fees were accepted, and on receipt of that confirmation deducted his fees from settlement funds received, and paid out his clients. Mr AW retained $40,000 to cover anticipated costs if (after consultation with the company's liquidators) a decision was made to commence action against DEF Ltd directors. Those funds remained in Mr AW's firm's account at the date of the review hearing.

The Complaint and the Standards Committee Decision

[13] On 22 August 2012, Mr HK filed a complaint against Mr AW with the New Zealand Law Society Complaints Service.

[14] That complaint was filed on the Complaint Service's standard form, and records that Mr HK was authorised to progress the complaint on behalf of DV. Explanation provided for the delay in filing the complaint (Mr AW's final account being rendered in September 2009) was that Mr DV was unable to speak English, and had lost contact with Mr HK. Mr HK describes himself as having previously been employed by Mr DV as Mr DV's secretary. Mr HK says that when Mr DV re-established contact with him after a lengthy period of non-contact, he had "begged" Mr HK to pursue a complaint against Mr AW.

[15] Subsequent to filing his initial complaint, Mr HK advised the Complaints Service that he been authorised to represent three more of Mr AW's clients. Four of Mr AW's clients have pursued complaint. Four have not.

[16] Mr HK, on behalf of the four applicants, makes complaint that Mr AW:

(a) Had advised that legal costs for each client would be pegged at $10,000.

(b) Had failed to provide documents when requested.

(c) Had continued to hold funds of $40,000, in the absence of explanation as to why those funds were being retained.

[17] In response to the initial complaint, Mr AW submitted that:

(a) Mr DV had, at all material times, represented all of the shareholders.

(b) Agreement to fees charged had been confirmed by his clients.

(c) He regularly met Mr DV and other members of the group during the proceedings and reported to them.

(d) Prior to rendering his final account he had met with Mr DV and other shareholders, had discussed the account, provided a comprehensive reporting letter, and obtained his clients' authority for release of funds.

(e) Fees charged were accepted.

(f) Concerns raised regarding fees rendered had been addressed at a meeting in December 2012, and that issue, together with other matters, had been resolved.

(g) There was no apparent justification for the considerable delay between his reporting to his clients on 22 September 2009 and the complaint to the New Zealand Law Society being made nearly three years later.

(h) The complaints filed were not a genuine reflection of his clients' concerns, but rather prompted by Mr HK who, in pursuing the complaint, was motivated by prospect of personal financial gain.

[18] The Standards Committee distilled the issues to be addressed as follows:

(a) Did Mr AW fail to release files to clients on request? (Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), rule 4.4.1.)

(b) Did Mr AW fail to follow instructions to release funds to clients on request? (rule 3; and Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Regulations) regs 10 and 12(6)).

(c) Were Mr AW's costs fair and reasonable? (rule 9).

(d) Did Mr AW advise when his fee estimate was exceeded? (rule 9.4, ss 106 and 112 of the Law Practitioners Act 1982 (1982 Act).

[19] The Committee also considered two jurisdiction issues, noting that the fee complaint concerned a bill of costs which was rendered more than two years prior to the date of the complaint, and that the aspect of the complaint engaging criticism that Mr AW had failed to keep to his fee estimate, involved conduct that occurred prior to 1 August 2008, being the commencement date of the Lawyers and Conveyancers Act 2006 (the Act).

[20] Neither of the jurisdictional obstacles was perceived by the Committee to hinder its ability to progress its inquiry.

[21] At the outset the Committee addressed the question of reg 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committee) Regulations 2008. This rule states:

> If a complaint relates to a bill of costs rendered by a lawyer … unless the Standards Committee to which the complaint is referred determines that there are special circumstances that will justify otherwise, the Committee must not deal with the complaint if the bill of costs –
>
> (a) was rendered more than 2 years prior to the date of the complaint; …

[22] The Committee concluded that special circumstances existed which would justify the Committee considering the fee complaint (though no reasons were provided for that finding), and determined that the conduct issues arising before 1 August 2008, had to be considered by reference to the conduct thresholds which could have prompted a disciplinary response under the 1982 Act, being conduct that constituted misconduct, or conduct unbecoming, or negligence or incompetence of such a degree as to bring the profession into disrepute.

[23] In its decision delivered on 3 October 2013, the Committee determined to take no action in respect to each of the matters considered. In arriving at that outcome, the Committee noted that:

(a) It was satisfied with Mr AW's explanation for his failure to release files.

(b) Mr AW's clients had agreed to him retaining funds.

(c) Fees charged were fair and reasonable.

(d) There was insufficient evidence to conclude that Mr AW had failed to advise his clients as to the situation with their fees.

Application for Review

[24] Mr HK filed an application to review the Committee's decision on 30 October 2013. The application provides a comprehensive narrative of the various events, and provides account of Mr DV's recollection and understanding of what transpired at various meetings. Whilst Mr DV is the person who is advancing the complaint (there is no information on the file recording the views of any of the other complainants) Mr DV's position is entirely advanced by Mr HK.

[25] Mr HK argues that the Committee's decision is unsound and that the Committee had made a number of errors. He submits that:

(a) Mr DV had made it emphatically clear at the outset, that the maximum each of the shareholders could contribute to legal costs was $10,000.

(b) Those instructions had been confirmed in correspondence to Mr AW.

(c) Suggestion of the retainer proceeding on a contingency fee basis arose after an initial agreement had been reached to cap fees at $10,000, however it was Mr DV's understanding that a 50 per cent increase would be calculated by reference to the maximum fee payable of $80,000.

(d) Fees charged were excessive.

(e) Fees charged for translation services were excessive.

(f) Mr DV did not accept the final invoice. His understanding of English was limited, and he was reluctant to challenge Mr AW on the fee.

(g) An apparent lack of complaint from the remaining shareholders does not indicate tacit acceptance of the account, or Mr AW's billing methods. There are other reasons which account for failure of the other shareholders to join the complaint.

(h) Agreement had not been reached after the December 2012 meeting.

(i) Mr AW had misled the Committee.

(j) Mr AW had failed to release funds.

(k) Mr AW had failed to release files.

[26] By way of outcome, Mr DV seeks:

(a) Refund of the "uplift" portion of the fees.

(b) Return of fees held on account.

(c) Return of documents.

(d) Opportunity to inspect files.

[27] Mr AW was invited to respond to the review application. In his initial response, he referred to the Committee's finding that "special circumstances" existed and sought a preliminary ruling on whether there had been jurisdiction to deal with the costs complaint.

[28] Because the Committee decision had provided no reasons to explain its conclusion that "special circumstances" existed this Office requested from the Complaints Service the Committee's reasons for arriving at that view. The Complaints Service provided relevant sections of the Committee minutes which indicated that the Committee was aware of the provisions of reg 29 and recorded in its minutes of 10 July 2013:

> 63. The Committee noted that at least one of the complainants was said to have English language difficulties, which it considered could have been a factor in the delay in bringing the complaints.
>
> 64. The Committee also considered that the level of the alleged overcharging was of such a level that warranted the complaints being dealt with.

[29] On 9 May 2014, Mr AW provided a detailed response to the review application. He indicates some difficulty in understanding all of the comments made by Mr HK, and focuses on his dealings with Mr DV and the other clients, and provides detailed account of the complex and lengthy litigation he conducted on behalf of the complainants.

[30] Further correspondence was received from Mr AW in which he made further submissions in support of his contention that reg 29 defeated any attack on his bill of costs. He argues that Mr DV and colleagues have advanced no grounds in support of a finding of "special circumstances". He submits that the applicants have not explained the delay in bringing complaint, pointing out that each applicant had the bill before it was applied and had approved the bill:[1]

> It was provided to them and explained to them in their language and they raised no concern until after the expiry of two years and do not explain any delay. Many of the clients in the group have not complained about the bill, therefore the applicants cannot complain about the bill as others by inference accept the bill.

[31] In January 2015 Mr AW provided further submission in support of his argument that reg 29 defeated any attack on his bill of costs.

Review Hearing

[32] A review hearing was held on 29 June 2015 which was attended by Mr AW and Mr HK.

[33] There has been a regrettable delay in having this decision available to the parties. I apologise to the parties for that delay.

Nature and Scope of Review

[34] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[2]

> … 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,

[1] Letter GHI Law Firm to Legal Complaints Review Officer (LCRO) (17 September 2014) at [3].
[2] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]-[41].

> 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.

[35] More recently, the High Court has described a review by this Office in the following way:[3]

> 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.

[36] 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.

Analysis

[37] The issues to be determined are:

(1) Were there special circumstances that merited the bill of costs being considered outside the two year timeframe for filing fee complaints?

(2) Was agreement reached as to an agreed fee for services to be provided, and in particular, an agreement reached that Mr AW could increase his fee by 50 per cent in the event of successful outcome?

(3) Were the fees charged excessive?

(4) Had Mr AW failed to release files on request?

(5) Had Mr AW failed to release funds to clients on request?

---

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

Were there special circumstances that merited the bill of costs being considered outside the two year timeframe for filing fee complaints?

[38] Mr AW submits that there are no special circumstances which would merit departure from the constraints imposed by reg 29.

[39] The question is whether special circumstances existed for the Committee to deal with the complaint. The term 'special circumstances' is not defined. A leading authority on what constitutes special circumstances is the decision in *Cortez Investments v Olphert and Collins*.[4] The case involved an application to the Court under s 151 of the 1982 Act for an order that a bill of costs be referred for revision, where the bill had already been subject to revision. Section 151 of the 1982 Act provided that the Court shall not make an order for the reference of a bill for revision except in special circumstances.

[40] The Court of Appeal rejected the trial Judge's finding that a serious risk of injustice was required. Although the three members of the Court produced three different tests, the tests advanced provide useful guidance in considering the meaning of 'special circumstances'. Woodhouse P said that "if the issue is to be related to perceived injustice then the simple risk of injustice should be sufficient".[5] Richardson J, considered that "it is a question of where the interests of justice lie in all the circumstances".[6] McMullin J's view was that "all that can be said is that to be special circumstances must be abnormal, uncommon, or out of the ordinary" and "if there is a perceived risk of injustice I do not think that anything more is required".[7]

[41] Applying the tests above, it is my conclusion that in the current matter there are special circumstances that are abnormal, uncommon or out of the ordinary, and that there is a perceived risk of injustice. Consideration of the basis for Mr AW's legal fees of $522,492.16 is appropriate for the following reasons:

(a) The quantum of the fee. The final fee rendered is, by any assessment, a substantial fee.

(b) The fee was rendered at the conclusion of proceedings which took over four years to bring to finality. There was no indication on the Standards

[4] *Cortez Investments Ltd v Olphert and Collins* [1984] 2 NZLR 434 (CA).
[5] At 437.
[6] At 441.
[7] At 441.

Committee file, or in the material provided to this Office, of Mr AW having provided to his clients during the course of the lengthy proceedings, any written indication as to what the position was with their fees.

(c) The substantial increase in the fee based on argument (contested) that there was an agreement that Mr AW was entitled to impose a significant uplift to the fee in the event of successful outcome is, in itself, a feature of such significance that would properly merit description as a special circumstance.

(d) The Committee considered that the fact that Mr DV had a limited grasp of English constituted a special circumstance. I agree with that proposition to a limited extent, but do not place the reliance on it (for reasons that will become clear later in this decision) as did the Committee.

[42] The level of the alleged overcharging, and the fact that the final fee was so substantially increased by the imposition of an "uplift" element are the most significant factors in establishing special circumstances.

Was agreement reached as to an agreed fee for services to be provided, and in particular, an agreement reached that Mr AW could increase his fee by 50 per cent in the event of successful outcome?

[43] Mr AW confirmed his instructions to act for the eight shareholders in November 2005. He rendered his account almost four years after receiving instructions. The litigation was complex and the account rendered substantial. The final account rendered (including costs) was in the sum of $522,492.16. Of that fee, $174,164.03 (GST inclusive) was charged on the basis that agreement had been reached that an uplift fee would be imposed if successful outcome was achieved.

[44] Considering the scope of the litigation and the nature of the fee agreement, it would present as essential that the parties would, at commencement, have had a clear understanding of the nature of the fee agreement and some appreciation as to what the final fee would be. If it was difficult to provide estimate as to final cost because of uncertainty as to what path the litigation may travel, it would be at least expected, when

fees are being incurred in these sums, that Mr AW's clients would have received regular updates on the escalating cost of their litigation.

[45] Mr AW emphasises that he reported regularly to his clients, and kept them up to date on the costs situation, but providing regular accounts to his clients over the four-year period, would have provided a complete response to allegation that his clients were unaware of the extent of the fees being accrued, and would have satisfied the commitment he had made to provide regular accounts.

[46] Mr HK says that the agreement reached at commencement was that costs would be capped at $80,000, and that the shareholders were determined that fees would not exceed that figure. Mr HK places reliance on an email that Mr DV had forwarded to Mr AW in which Mr DV had emphasised that costs must be limited.

[47] Whilst Mr DV raised complaint that agreement had been reached at commencement to peg the fee, there is little indication in the Committee's decision of having addressed that issue as a separate matter. Whilst the decision does consider the parties' submissions on the issue (at [58]-[60]), it records no conclusion, but rather addresses the argument by determining that it had sufficient information before it to reach conclusion that the fees charged overall were reasonable.

[48] The Committee's discussion as to the nature of the instructions provided at commencement notes:[8]

> [59] Nor did Mr AW provide a copy of any cost agreement as such, stating that such agreement was confirmed over several meetings and discussions and correspondence. Mr AW submitted that as his time commitments prevented him from a full examination of his extensive file spanning a number of years, and he had been unable to properly locate all relevant documentation relating to the earlier agreement and each time it was subsequently referred to in correspondence.
>
> [59] Mr AW's submissions centred on his eight clients' previous acceptance of the invoice. Mr AW relied particularly on his reporting letter of 22 September 2009, which the invoice was enclosed, and the acknowledgement form that each client signed recognising the bill of costs. He gave a brief summary of the work involved.

[49] That presents as unsatisfactory. Complaint was being made about a substantial fee, a fee that had incurred an increase of $170,164.03, as consequence of argument that a contingency fee arrangement with provision for significant uplift had

[8] Standards Committee decision 3 October 2013.

been agreed at the outset, but Mr AW is excused from providing full explanation as to the nature of the agreement reached and, importantly, requirement to provide evidence of the agreement being referenced in subsequent discussions and correspondence with his clients, by argument that pressure of commitments on his time, and the volume of files, had rendered him unable to locate the relevant documentation recording details of the agreement reached.

[50] Time pressures, and the volume of material on the files, should not excuse a practitioner from providing full response to a Committee's inquiry. This inquiry could have been significantly assisted if Mr AW had produced evidence of reporting letters to his clients in which he advised the current position with fees, and referenced the contingency arrangement.

[51] Mr AW fairly emphasises that the litigation was complex and prolonged. The matter took four years to settle. But there is no indication of Mr AW at any stage of that lengthy process, providing written advice to his clients as to the current state of the fees. I accept that Mr AW says that these issues were a matter of regular discussion between him and Mr DV, but evidence by way of file notes or copies of relevant correspondence, would have been of considerable assistance in clarifying the dispute as to the nature of the initial arrangements. The best possible evidence of acquiescence by his clients to the fees being charged, would be regular and unchallenged invoicing.

[52] It is important to reiterate that the conduct engaged at the commencement of the retainer was governed by the 1982 Act.

[53] Mr HK submits that Mr AW was provided with instructions in February 2006. Mr AW contends that his firm had been initially instructed in November 2005, but that work did not start on the Court case itself until he had accepted firm instructions in August 2006. Mr AW accepts that he issued demand on DEF Ltd immediately following receipt of instructions in November 2005, and that some preliminary work may have been carried out between November 2005 and August 2006, but little of significance. In correspondence to the LCRO dated 9 May 2014, Mr AW records that:[9]

> It is possible that some preliminary inquiries about background facts (such as company documents) were made by our staff solicitor, Ms BX (who was fluent in the Chinese language spoken by Mr DV) in the period between February 2006 and August 2006 before we received firm instructions with which we

[9] Letter AW to LCRO (9 May 2014) at [8].

> agreed, but we did not in fact start work on the court case itself until after we had accepted firm instructions in August 2006.

[54] Argument that minimal work was done in the period February 2005 to August 2006 presents as at odds with Mr AW's narration in his accounts, of the work completed during that period. His account for the relevant period refers to:

(a) Reviewing numerous documents.

(b) Reviewing orders made by the High Court.

(c) Extensive meetings with Mr DV in November 2005.

(d) Considerable research and analysis over the company structure.

(e) Correspondence with the company's solicitor.

(f) Extensive meetings.

[55] Fees incurred (exclusive of GST) for work completed between February and August 2006 amounted to $5,600.

[56] Mr AW's first account refers to "extensive meetings and correspondence over possible contingency fee and payments February 2006", and records "arrangement over instructions from DV, agreement reached in respect of fees/contingency component".[10]

[57] Three items of correspondence on the LCRO file refer directly to the fee arrangements. The first is correspondence from Mr DV to Mr AW, sent on the 17 February 2006, following a meeting Mr DV had with Mr AW the previous day. Mr HK maintains that correspondence supports the proposition that Mr DV had confirmed that costs must be confined to $10,000 per shareholder and had made enquiry as to whether additional costs would be incurred if the case was successful. A [Foreign] speaking solicitor employed by Mr AW provided him with a translation of Mr DV's correspondence. That translation records that Mr DV was advising that he could not afford to pay costs in excess of $10,000, but it is clear that the fee discussion proceeds from an understanding that the work contemplated at that initial stage involved a

[10] GHI Law Firm account, 22 September 2009.

summary judgment application. Mr HK contends that Mr AW failed to provide response to Mr DV's correspondence. Mr AW disputes that. Little turns on the point.

[58] The second item of correspondence is forwarded by Mr AW to Mr DV on 15 May 2006. In that correspondence, Mr AW:

(a) Acknowledges Mr DV's advice that he is unwilling to pay costs on a summary judgement application in excess of $10,000.

(b) Estimates likely costs of $20,000 on the summary judgment application.

(c) Confirms he will accept interim payment to costs if there is agreement to a contingency factor.

(d) Estimates cost of proceeding to hearing of $70,000.

(e) Identifies difficulty in providing accurate estimate of fees, and possibility of need to review the fee.

(f) Indicates that he is mindful of the concerns expressed regarding costs, and advises that he is prepared to act on a contingency basis.

(g) Confirms that he will render an account from "time to time" throughout the case, but that payment of only 50 per cent of the accounts rendered will be required. Payment of the balance will be payable at the time of, and dependant on, outcome.

(h) Notes that if the outcome is favourable, payment of the normal fee will be required, "plus a 50 per cent increase due to the contingency element".

[59] Mr AW writes further to Mr DV on 9 August 2006. In that correspondence, Mr AW:

(a) Confirms instructions to commence proceedings.

(b) Records that the clients will pay $7,000 during the course of the proceedings.

(c) Opines that the proceedings will likely be concluded in six to nine months.

(d) Records that the total fee will be dependent on the outcome that had been previously advised.

(e) Confirms that the clients are to pay 50 per cent of the initial sum that had been agreed to be paid, with the balance of $3,500 to be paid on November 30, 2006.

[60] Mr AW's correspondence of 9 August 2006 is consistent with his argument that he had discussed a fee arrangement with Mr DV, and had confirmed an agreement to pursue the proceedings on the basis that, if successful, he would be able to charge an uplift fee. Payment by each of the clients of an initial contribution to costs in the sum of $10,000 is recorded in the correspondence of 15 May 2006, and confirmed in the later correspondence.

[61] Whilst Mr DV argues that agreement had been reached to peg the total cost at a maximum of $80,000, and he relies on his correspondence of 17 February 2006 to confirm that as his position, it is nevertheless conceded by Mr HK that Mr DV was aware of a contingency agreement. In his submissions filed in support of Mr DV's review application, Mr HK notes that "later AW did mention contingency, and DV believed 50 per cent increase is 50 per cent of the original maximum, $80,000 and he reluctantly agreed $40,000 increase".[11] That presents as inconsistent with the position advanced by Mr HK in correspondence to the Complaints Service in March 2013 where he notes that:[12]

> On a certain stage, Mr AW wished to change it to contingency. But the message was not passed to Mr DV. That is why Mr DV was shocked to receive the final invoice and his relationship (some of 30 years) with other shareholders was damaged.

[62] It is clear that the initial discussions concerning fees, were conducted within a framework of expectation that the litigation would be resolved and hopefully concluded through the relatively expeditious process of summary judgment, with further costs if the summary judgment application had to proceed to a full hearing. It is within that context that initial estimates of likely fees of $20,000 and $70,000 are discussed. But

[11] HK submissions to LCRO, 30 October 2013 at [2].
[12] HK email to VW (11 March 2013).

Mr AW emphasises that his estimates are only a guide, and may need to be reviewed once the proceedings are underway.

[63] It is regrettable that the only correspondence available which records Mr AW's explanation of the proposed fee agreement, is correspondence which is clearly framed within a context of Mr AW providing advice on the likely costs of pursuing litigation through the summary judgment procedure. This is clearly evidenced by the discussions as to the proposed options, and the arrangements made for his clients to make payment of costs on account in a sum which would meet Mr AW's anticipated cost of pursuing the summary judgment application, if required, to full hearing.

[64] The question is, did Mr DV and his colleagues continue, in the absence of advice from Mr AW, to labour under the misapprehension throughout the course of the lengthy litigation, that their costs would be pegged at the estimate provided for progressing a summary judgment application.

[65] I do not consider it tenable, or consistent with the evidence of the history of the litigation, that Mr DV and his colleagues considered that Mr AW's fee for extensive work conducting complex litigation through a series of courts over a number of years, was to be limited to the initial estimate he had provided for proceeding a summary judgment application.

[66] Mr AW says that he met regularly with Mr DV during the course of the proceedings (and on occasions other shareholders), and that he would have been advised of the current cost in the proceedings. I accept Mr AW's submission that issues of escalating costs were raised with his clients.

[67] Examination of Mr AW's accounts confirms that Mr AW met regularly with Mr DV, and reported to him frequently. Those accounts also give clear indication of the evolving complexity of the proceedings and the obdurate and seemingly intransigent approach adopted by the defendant company.

[68] Underpinning Mr HK's submission is argument that Mr DV, because of language difficulties, had difficulty understanding the fees arrangement. I accept that language difficulties can present a genuine obstacle to a party's ability to understand legal issues, but I do not accept that Mr DV was progressing down a labyrinth of evolving litigation, oblivious to the costs that were accruing, comforted by a mistaken

view that costs would be pegged at an estimate provided for progressing a summary judgment application to conclusion.

[69] Mr HK advises that Mr DV was formerly the [occupation] of a major [text removed] company in [[Overseas]]. From that it is reasonable to conclude that Mr DV was a person with a sophisticated background in business affairs, and a realistic appreciation and understanding of the fact that the more time Mr AW was required to spend on the case, the more cost that would accrue. Mr AW was able to seek assistance from a [Foreign] speaking staff member. Professional interpreters were extensively used. I do not accept that language barrier can be fairly advanced as explanation for not understanding the fee arrangements.

[70] On occasions Mr AW had to obtain funds from his clients for the increasing costs of disbursements. Substantial costs were incurred in obtaining interpreter services.

[71] Mr AW emphasises that no objection was raised by any of his clients, when he tendered his final account. I think it probable that significant objection would have been raised, if Mr AW's clients maintained a firm conviction that their legal costs had been fixed at commencement at a sum considerably less than what they had been charged.

[72] Nor does Mr AW's clients' willingness to allow a portion of their settlement funds to be held back by Mr AW as a retainer for further instructions present as the likely response of clients who had been significantly misled by their lawyer as to the terms of the engagement.

[73] If it is accepted that Mr AW's clients were advised once it became apparent that the dispute would not be resolved through the summary judgment process, that he would continue work on a charge for time basis, did Mr AW's clients continue to be bound by the contingency fee agreement which had been formulated within the context of expectation that the work would engage a straightforward application for summary judgment? Were his clients aware that the contingency arrangement continued?

[74] I conclude that they were. In reaching that conclusion, I place reliance on Mr AW's submission that he regularly discussed the fee arrangement with his clients, the lack of objection raised by his clients when his accounts were first rendered, and the fact that continuing with the fee arrangement agreed at commencement in the absence of evidence to the contrary, presents as consistent.

[75] I conclude that Mr AW's clients were aware that Mr AW had agreed to do the work on a contingency basis, and were aware that the contingency agreement continued throughout the course of the evolving litigation.

Were the fees charged excessive?

[76] Mr AW charged his clients a fee of $309,625 plus GST and to that added an adjustment fee of $174,000. The fee is substantial.

[77] The Committee considered the reasonableness of the fee by addressing the factors set out in rule 9.1.

[78] The Committee considered that it had sufficient information before it to reach a conclusion as to the reasonableness of Mr AW's fee,[13] and that it could make a "just and proper" decision on the basis of the information available. Mr AW offered to provide the Committee with a copy of his time and trust account records, but it appears to be the case the Committee did not avail itself of the opportunity to obtain those records.

[79] In concluding that it could make a just and proper decision, the Committee placed considerable reliance on the invoices provided by Mr AW, which were described by the Committee as detailed and illustrative of the work that had been completed. Those invoices were completed at the conclusion of the litigation. The Committee noted that the litigation had gone on for a lengthy period of time and that the litigation of this nature was complex and costly. It noted that a good result had been achieved for Mr AW's clients.

[80] The Committee correctly noted that the litigation was prolonged and that litigation of this type was expensive. I am uncertain as to whether the Committee examined Mr AW's files, but it appears that considerable reliance was placed on Mr AW's invoices (described as detailed) and its assessment that the litigation was complex.

[81] There must be a degree of caution exercised when assessing reasonableness of a fee in placing undue reliance on invoices raised at the conclusion of prolonged litigation, particularly in circumstances where there appears to have been no indication

[13] Above n 9 at [63].

to the clients as to what the position was with their fees, until the matter had been concluded.

[82] Whilst argument that Mr AW failed to keep his clients informed did not form part of the complaint put to and considered by the Committee, it would have been prudent of Mr AW, and consistent with his obligations to keep his clients informed, if he had rendered accounts to his clients on a regular basis so that they were fully aware of the escalating costs of the litigation.

[83] Mr AW's obligation to keep his clients' informed, was not diminished by the particular nature of the retainer, which provided that his final fee would be determined by outcome. In his correspondence of 15 May 2006, in which he clarified the basis of the contingency fee agreement, Mr AW advised his clients that he would "render a bill from time to time throughout the case, but you will only have to pay 50 per cent of the bill at the time it is rendered. The other 50 per cent of payment will be payable at the time of and dependent upon the outcome." Whilst instructions to proceed are confirmed in the latter correspondence of 9 August 2006, that correspondence makes reference to the arrangements for payment agreed and recorded in earlier correspondence.

[84] If that commitment had been followed, much of the argument both as to the reasonableness of the fee, and the nature of the fee agreement, would likely have been avoided.

[85] I form no view as to the reasonableness of Mr AW's accounts but I consider that it would have been prudent for the Committee to have instructed a costs assessor to review the fee.

[86] The fee was substantial. There does not appear to have been compliance by Mr AW with his undertaking to provide regular accounts. The litigation extended over four years. The substantial uplift on fee, demands a careful examination of the work done to arrive at the base fee. In these circumstances, the degree of attentive examination that a costs assessor would be able to bring to scrutiny of the fee, is merited.

[87] Mr AW makes complaint that his clients had confirmed their agreement to settle the account in writing, and that complaint was raised some considerable time after the account had been rendered and paid.

[88] The fact that the complainants had agreed to pay the bill, does not prevent them from subsequently raising objection. Any person who is chargeable with a bill of costs, whether it has been paid or not, may complain to the appropriate complaints service about the amount of any bill of costs rendered by a practitioner.[14]

[89] I consider it appropriate that the question as to the reasonableness of Mr AW's fee be referred back to the Committee with direction that a costs assessor be appointed.

Had Mr AW failed to release files on request?

[90] I have carefully considered this issue and agree with the Committee that the explanation provided by Mr AW for failing to release the files, and in particular his invitation to Mr HK to inspect the files, provided satisfactory response to allegation that he had breached his professional obligations.

Had Mr AW failed to release funds to clients on request?

[91] At the conclusion of the litigation, consideration was given to whether Mr AW's clients would commence action against the former directors of the company. That decision was to be made after consultation with the liquidator.

[92] In his complaint filed with the Complaints Service on 24 August 2012, Mr DV makes complaint that Mr AW is retaining funds in the sum of $40,000 in his account.

[93] Mr AW contends that all of Mr DV's concerns (including continued retention of funds) were addressed at a meeting held with Mr DV in December 2012, at which time agreement was reached that funds would continue to be retained.

[94] Mr DV subsequently (through his representative Mr HK) rejected suggestion that agreement had been reached in terms as suggested by Mr AW at the December 2012 meeting, but irrespective of the uncertainty as to what was or was not agreed, by March 2013, it was clear that Mr DV was making demand of Mr AW to refund the $40,000 funds held in his account to the eight shareholders. In correspondence to the Complaints Service dated 10 March 2013, Mr HK advises that Mr DV:

[14] Lawyers and Conveyancers Act 2006, s 132(2).

> … was not happy and wants AW to refund the extra charge and $40,000 fund to eight shareholders. If AW changes his mind and believes DV can no longer represent other seven, he should refund DV's part.

[95] I consider it probable that Mr AW had been made aware, prior to complaint being lodged, that requests was being made by some of the clients for funds held to be released.

[96] In addressing complaint that Mr AW had failed to release funds, the Committee concluded that the clients had initially agreed to retain the funds, and noted that Mr AW had advised that he would account to his clients once he had received "a final decision not to pursue the directors". The Committee's decision was delivered in October 2013.

[97] At the time of the review hearing, approaching two years after the Committee had delivered its decision, the funds remained in Mr AW's account. He was questioned as to why the funds had not been released. Following the hearing, Mr AW in correspondence to this Office dated 29 July 2015, provided a copy of correspondence forwarded to Mr DV on 28 July 2015, in which Mr AW advised that he was now in a position to conclude his advice that no proceedings be brought, and that he would be in a position to prepare his final bill of costs and statement, and disperse balance of funds held shortly. That correspondence focuses, in significant part, on Mr AW providing explanation for the delay in him being able to release funds.

[98] Mr AW submits that he was unable to release funds earlier because:

(a) His instructions to proceed with completing assessment as to the viability of proceeding a claim against the former directors had been confirmed at a meeting in December 2012.

(b) His ability to complete that assessment had been hampered by delay in receiving relevant information from the liquidator, those delays occasioned by:

(1) Problems with obtaining the company records.

(2) The liquidator's retirement.

(3) The liquidator's frequent absences overseas.

(4) The liquidator's move to the South Island.

(c) Complaint had been made by four of his clients. He considered that the remaining four wished for him to continue with the retainer.

(d) Progress in concluding the matter was hampered by legal proceedings initiated by Mr HK.

(e) The liquidator was only able to provide assessment as to the viability of further proceedings after High Court proceedings had been concluded in May 2014.

(f) The filing of the conduct complaints compromised Mr AW's position, and final advice could only be concluded after the Standards Committee, and the Office of the LCRO, had concluded their inquiries.

[99] Underpinning these submissions is the proposition that Mr AW was prevented from releasing funds on request, and that he was duty bound to retain those funds until he had completed his instructions.

[100] The Standards Committee decision, in my view, fails to adequately address the issue as to whether Mr AW refused to release funds on request. The Committee accepted Mr AW's explanation as to why the funds were initially retained, but that was not the focus of the complaint. It was not suggested that Mr AW had at the outset retained funds without instructions to do so. The question was whether he was able to continue to retain those funds in the face of request to return them. The Committee accepted Mr AW's explanation that his clients had agreed to the retention, but it is apparent that some of them had not. It appears from the Committee's analysis, that the Committee had formed the view that the problem was likely to be promptly resolved, in the face of assurances from Mr AW that the liquidator's completion of the liquidation was imminent, at which point Mr AW would be in a position to account to his clients. Whilst the Committee clearly drew comfort from that assurance, the Committee does not directly address the issue as to whether Mr AW was entitled to make the process of accounting to his clients conditional upon the liquidator's opinion.

[101] I will address each of Mr AW's explanations for his decision not to release funds in turn.

Delay in obtaining information from the liquidator

[102] At the conclusion of the substantive proceedings in 2009, Mr AW was instructed to explore the possibility of bringing a claim against the former directors. His brief was exploratory, and designed to do no more than ascertain whether it would be viable for his clients to consider pursuing a claim.

[103] It would be reasonable to infer that Mr AW's clients, having incurred significant costs, would be anxious to establish likely prospect of success before embarking on further litigation.

[104] Mr AW was not instructed to commence proceedings, merely to explore the viability of doing so.

[105] Mr AW places significant emphasis on the fact that the liquidator was unable, for a variety of reasons, to provide an accurate assessment as to whether the company retained sufficient assets to justify his clients commencing proceedings.

[106] He argues that the various factors which inhibited the liquidator from obtaining a final report (retirement, overseas travel, moved to the South island) contributed to the delay in "resolving whether there was a claim against the former directors".[15]

[107] Mr AW says that his hands were tied until such time as he received advice from the liquidator as to the state of the company's affairs, and that he was duty bound to continue to represent his clients, until the final report from the liquidator was obtained.

[108] Mr AW's instructions to advise his clients on prospects of future recovery are recorded in his correspondence of 22 September 2009, correspondence prepared immediately prior to providing his final account. He instructs that he anticipates being in a position to provide advice to his clients in a few days.

[109] In correspondence to his clients dated 21 January 2013, in excess of three years after Mr AW had given indication that he anticipated being able to obtain the necessary information in a few days, Mr AW advises that "the matter is still being investigated". He submits that he had explained the reason for the delay to his clients, and that they were accepting of it.

[15] Email AW to LCRO (28 July 2015).

[110] In that correspondence, Mr AW records that funds were retained on the basis that "they would provide funding if in consultation with the liquidator it was considered that there could be recovery from the directors who had mishandled the company's money".

[111] Mr AW's argument that he was unable to resolve matters until receipt of a report from the company liquidator, was further emphasised in his response to the Complaints Service on 7 March 2013, where he notes that:

> The matter of the [ ] pursued against the other directors was explained with the difficulties but the matter is not yet resolved with the liquidator. This was accepted by the client meeting covered all related issues and there was no request the money.

[112] Whilst Mr AW contends that he needed to obtain a report from the liquidator before he could properly assess the prospects for further litigation, it is clear that there was other information available to Mr AW which could assist him in making appraisal of litigation risk.

[113] Mr AW had spent four years pursuing action against the company, litigation which he describes as complex and difficult. It could reasonably be inferred that Mr AW would have had a detailed knowledge as to the state of the company's affairs at the conclusion of the substantive litigation, including significant information about the directors.

[114] In May 2014, Mr AW represented the liquidator in proceedings brought against the liquidated company in the High Court. In its judgment delivered on 8 May 2014, the Court noted that Mr AW had advised the Court that the liquidators were in a position to distribute a "small amount of funds available for distribution". The judgment notes that the company is "in the late stages of liquidation and has limited funds".[16]

[115] In his final reporting letter of 28 July 2015, Mr AW confirms to his clients that he had cautioned them in December 2012 as to the significant problems they would face if a decision was made to pursue the former directors.

[116] Mr AW notes that he had advised his clients in December 2012 that there was a significant problem with the directors no longer residing in New Zealand. He cautions against the additional costs that would incur pursuing parties residing outside the New

[16] *HSU v Moore Stephens Markhams Limited liquidator of Tang Shuo Development Co Ltd (in liq)* [2014] NZHC 961 at [2] and [16].

Zealand jurisdiction. He cautions at that time that even if judgment was obtained, enforcing a judgment would be difficult.

[117] It appears that in December 2012, he had sufficient information to arrive at an informed view as to the significant risks that would be encountered if a decision was made to embark on further litigation. He remains however committed to the view that further investigation is required, including the obtaining of a report from the liquidator.

[118] In further correspondence to the Complaints Service dated 2 April 2013, Mr AW expresses reservations about the prospect of recovering from the directors. He notes that the investigations are not yet concluded, but records that most of the directors are residing in [Overseas], and that there would be difficulty in enforcing any judgment obtained in [Overseas].

[119] In correspondence to the LCRO dated 9 May 2014, Mr AW advises that he is continuing to retain funds in the sum of $40,000, for purposes of investigating the possibility of initiating proceedings. Mr AW advises that:

> We have continued to hold funds on the basis of an agreement with our firm made collectively between and among all eight of our clients that $5,000 each (a total fund of $40,000) would be retained by us in respect of investigating the possibility of proceedings against former directors of the company personally for additional losses our clients claim to have sustained beyond what they recovered. We have pursued that work in accordance with our instructions. This work includes meetings with the liquidator. At this stage we are not clear about whether our instructions will be to proceed further, or not. We had been waiting for that to be clarified. If we are instructed that no further steps will be taken then we will be in a position to render a fee for the work we have done, deduct it from the amount held on account of all eight clients and disperse the balance to them pro rata – that we do not have a specific $5,000 fund for each, to repay to each, including the four complainants in this case. The instructions we received in respect of those funds were from all eight as a collective group.

[120] This explanation suggests that Mr AW considers that he is still bound by instructions to continue inquiry into the viability of commencing proceedings, and is awaiting instructions from his clients to clarify whether they intend to proceed further despite:

(a) Four of his clients advising that they wished to have funds returned.

(b) Four of his clients pursuing conduct complaints.

(c) Him being aware in December 2012 of the difficulties that would be faced of recovering any proceeds from successful litigation.

(d) His appearance as counsel for the liquidators in proceedings in the High Court in May 2014, at which time submission was made to the Court that the liquidation was close to being finalised, and that a small amount of funds would be available for distribution.

[121] Following the conclusion of the review hearing, Mr AW finally found himself in a position where he considered that he could provide advice as to whether it would be viable to pursue a claim against the former directors, close the file, render an account to his clients, and distribute balance of funds held after deduction of fees.

[122] Mr AW's reporting letter of 28 July 2015 provides comprehensive explanation as to why he considered he was constrained from releasing funds earlier. It is relevant to examine that correspondence with a view to determining what events had transpired around mid 2015 that had altered Mr AW's stance, and placed him in the position where he was able to finalise his advice, close the file, and release funds.

[123] Mr AW does not identify any material change in circumstances. There is no indication in Mr AW's correspondence of 28 July 2015 that the liquidator's report had just come to hand, or that his opinion was informed by any recent information provided by the liquidator. He continues to maintain that he was obliged to continue pursuing the matter as he considered that the four shareholders wished him to do so. He continues to contend that delay on the part of the liquidator frustrated the process. He continues to maintain that impediments to the liquidator producing his report frustrated his ability to bring the matter to conclusion.

[124] Mr AW concludes that "there is no profit in taking action against the directors. It would be risky, costly and probably not result in any payment to the shareholders". He considers that any litigation against the directors was fraught with "considerable problems". He notes his view that the litigation would likely be long and expensive. He advises that the company records were in a mess. He notes that there were conflicting lists of shareholders.

[125] I do not accept Mr AW's argument that his ability to return funds to his clients was compromised by delay on the part of the liquidator. That analysis puts the cart before the horse, and accords greater priority to the liquidator's timetable than it does

to the client's instructions. In any event it appears to be the case that the information that Mr AW had available to him in July 2015 which allowed him to reach firm conclusion as to the likely risk of further litigation, was information that was available to him well before 2015.

Prevented from finalising matter - No instructions received from four other shareholders to cease instructions.

[126] Mr AW argues that he was unable to close the file and account to his clients, as the instructions he received at commencement were from eight shareholders, and in the absence of indication from four that they wished him to conclude the retainer, he was obliged to continue.

[127] That position is initially advanced by Mr AW in his initial response to the Complaints Service of 22 February 2013, where he advises that it was difficult for Mr DV to withdraw from the group, as it "cuts across the joint venture".

[128] In further correspondence to the Complaints Service of 7 March 2013, Mr AW notes that "it is difficult for one person in the group to request the money to be paid to them when in fact they are part of a group action".

[129] In correspondence to the LCRO of 9 May 2014, Mr AW asserts that he will be in a position to return funds, if he receives instructions not to proceed further.

[130] In his reporting letter to his clients of 28 July 2015, Mr AW advises that he took the view that as complaint had been made by only part of the group, he considered that the other members wished for him to proceed.

[131] Mr AW's position in respect to retention of funds was advanced in clear and unequivocal terms by his counsel on review:

(a) If all eight clients agree and amend their instructions to GHI Law Firm, it is willing to refund the money held on their behalf. Until such time as its instructions are changed it is constrained to retain the fund on behalf of all eight clients collectively.

(b) It is willing to cooperate in seeking the appropriate instructions if that is the request of the eight clients. It considers it would be entitled to first

> deduct any fees and costs incurred in the work conducted so far in respect of the instructions from the fund of $40,000. It would of course seek clarity. It does not consider it is entitled to refund lots of $5,000 to each individual client who requests it without the express consent and authority of the others when the fund was created as a joint and collective fund.

[132] Reduced to its essence, Mr AW argues that he is constrained from releasing funds to four of his clients, because he has not received instructions from the other four to cease work. It is argument for the proposition that if eight clients collectively instruct a lawyer to complete a specific task, the lawyer is obliged to complete the work, even if half of the clients wish to bring the retainer to an end. It is a proposition that allows opportunity to a lawyer to continue to engage in work for a client when the client has indicated a desire to cease. It is a proposition that allows opportunity for a lawyer to continue to charge a client for services that the client does not want, and allows opportunity for a lawyer to deduct fees from funds held despite the client advising that the retainer is terminated. It is a proposition that presents at first blush as unpalatable.

[133] It is a proposition that presents at immediate odds with the principle that contracts of retainer between a client and solicitor are subject to an implied term allowing the client the right to terminate at will.[17] It is a proposition that presents at odds with the "unfettered" right of a client to change practitioner.[18] It is a proposition that imposes caveat on a practitioner's obligations to ensure that monies held on behalf of any person in a trust account are held exclusively for the benefit of that person and must be "paid to that person or as that person directs".[19]

[134] Rule 4.3.1, provides that a client has a right to terminate a retainer at any time subject only to compliance with any agreed terms in the retainer as to grounds and notice for termination, which are reasonable in the circumstances of the particular case.

[135] Mr AW is suggesting that his instructions to provide advice on the feasibility of future litigation were on the basis that he received a collective instruction, which bound all the clients, being an instruction from which they could only extricate themselves if there was agreement from every member of the group.

---

[17] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 (CA) at [37].
[18] *Laws of New Zealand*, Lawyers and Conveyancers (online ed) at [67], Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibilities and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [5.9].
[19] Lawyers and Conveyancers Act, s 110(1)(b).

[136] That position is emphatically put by Mr AW's counsel, when he submits that Mr AW would only agree to refund monies held, if all eight clients agreed to that course and amended their instructions.

[137] There is no indication that any of Mr AW's clients intended to be so inextricably bound by collective agreement which obviated their ability to assert any degree of independence with respect to their instructions.

[138] It is relevant to examine the basis on which Mr AW took instructions. It is clear that when Mr AW took instructions on the substantive matter, it was on the basis that he was instructed to act for a group of eight prospective plaintiffs. In correspondence to Mr DV dated 9 August 2006, Mr AW advises that he requires each client to execute an authority authorising him to act, "so that there can be no argument that we are properly instructed to issue proceedings on their behalf". In correspondence to the Complaints Service of 2 April 2013, Mr AW reports that his original instructions "involved acting for eight individuals". He advises that regularly throughout the proceedings he would meet with Mr DV and several other members of the group, and would regularly report to them, and receive instructions.

[139] At the conclusion of the substantive litigation, Mr AW accounts separately to each of his clients. He attached to his reporting letter of 22 September 2009, individual accounts for each of his clients together with an authority to be completed by each client. That authority records for each individual client that each client had, together with seven other persons, instructed Mr AW to act on their behalf in respect to their claim against the company. The authority records that Mr DV was authorised to provide the instructions.

[140] Whilst Mr AW's eight clients had instructed him on the basis that they had compatible interests in pursuing the claim, each of Mr AW's clients was individually instructing Mr AW.

[141] Mr AW's instructions to proceed inquiry into the possibility of pursuing recovery from the former directors, constituted fresh instructions.

[142] The basis of those instructions is not set out in a formal letter of engagement, but recorded in correspondence dated 22 September 2009.

[143] The scope of the instructions is described as providing "advice on future recovery". He indicates that he anticipates being in a position to provide a view, "in the next few days". Mr AW anticipates legal costs of approximately $10,000, and costs in the region of $30,000 to obtain financial reports. He notes that he has made provision for the payment of anticipated costs by retaining funds in the sum of $40,000.

[144] There is no indication that Mr AW obtained written confirmation from his clients of authority to retain funds in the manner he proposes, however the accounts provided to the clients record the funds retained, and he emphasises that he was instructed to retain funds.

[145] This second retainer was quite distinct from the first. An estimate of fees was provided as opposed to the contingency agreement. There was no suggestion in Mr AW's reporting letter that his clients were irrevocably bound to continue with their instructions, absent a lack of diligence on Mr AW's part.

[146] There is no indication in the correspondence confirming the scope of the instructions and Mr AW's advice regarding retention of funds, of any terms in the agreement which could be advanced by Mr AW as providing support for argument that the individual client's capacity to terminate their retainer was fettered.

[147] Whilst Mr DV was described by Mr AW as the "focus of the instructions" and a person who had "at all times represented that he was appointed by the group of individuals" as the group spokesperson,[20] Mr AW notes that he met regularly with Mr DV and several other members of the group throughout the course of the proceedings, and would report to them.[21]

[148] It is not the case that Mr DV and his fellow shareholders were inextricably bound to have Mr AW continue to investigate the viability of the potential claim against the company directors, if they had decided that they did not wish to pursue a claim. They were free to withdraw their instructions at any time.

[149] Nor is it clear what position was being advanced by the four clients who did not join the complaint.

[20] Letter AW to Complaints Service (2 April 2013).
[21] At 2.

[150] Mr AW contends that in the absence of instructions from those four clients, he was duty-bound to continue to work, and to retain funds. Whilst Mr AW cites the absence of complaint from four of the clients as evidence of those clients degree of satisfaction with the service he provided (and that may well be their position), Mr HK suggests that the lack of apparent input from the remaining members of the group in recent years is more reflective of the fact that contact has, for a variety of reasons, been lost with those members, than it is indicative of support for Mr AW's position.

[151] Any conclusion as to the positions adopted by the four members can only be speculative in the absence of any indication from those members as to their views. But no evidence was put before the Committee, or before this Office, to indicate that Mr AW, once he had been placed on notice that four of his clients were pursuing complaint and making demand of him to return funds, had sought instructions from his remaining clients as to whether they wished for him to continue work.

[152] It would be reasonable to expect that a prudent and diligent practitioner, when put on notice that four members of a group of eight, did not wish for him to proceed with further work, would immediately have written to ascertain instructions from the remaining four.

[153] But that was not Mr AW's response. His response was to insist that he was bound by collective instruction, obliged to complete his brief, and required to retain funds until such time as the brief was completed, or he had obtained unanimous instructions from all of the clients.

[154] The consequence of Mr AW's conviction that he was unable to terminate the retainer and return funds to his clients, is that funds deposited to Mr AW's account in September 2009 in the sum of $40,000, remained undisbursed as at July 2015.

Ability to conclude the retainer compromised by the conduct complaints

[155] Mr AW argues that he was unable to bring resolution to matters until the conduct complaints had been resolved. He submits that he was unable to finalise his advice and reporting to his clients was compromised by the complaints which "effectively put the matter on hold".[22]

[22] Letter AW to DV (28 July 2015).

[156] I do not agree that the filing of the conduct complaint fettered Mr AW's ability to finalise matters. Four of his clients had advised that they required funds held on account of fees to be returned. The conduct complaints record a lack of confidence in Mr AW's representation, and give clearest indication that they do not wish for him to continue the retainer.

[157] At that point a number of options were open to Mr AW, but I do not consider that retaining client's funds was one of them.

[158] Mr AW suggests that his position was compromised by the fact that only four clients had made complaint, and that it would have been difficult to conclude the file and finalise his account, in the absence of instructions from four clients to do so.

[159] As noted, it would have been prudent for Mr AW to have sought instructions from his clients, immediately he was put on notice that a complaint had been made.

[160] If it was the case that he was unable to obtain instructions, I see no impediment to Mr AW closing the file, accounting to all his clients for work completed, and dispersing available funds.[23] If it was the case that some of his clients wished him to continue with instructions to assess prospects of recovery, they would be free to do so, and obliged to meet Mr AW's costs.

[161] There would have been nothing remarkable or untoward in Mr AW terminating the retainer and accounting to his clients by way of equal apportionment of cost, and indeed that process of accounting would have presented as consistent with the approach adopted at the conclusion of the substantive proceedings, and in line with his instructing letter and later instructions.

[162] Whilst Mr AW argues that he was unable to conclude the file until the complaints had been dealt with, he advises in July 2015 that he proposes to finalise matters within seven days and account to his clients. This before the decision of the LCRO was delivered.

[163] Rather than present as an obstacle to resolution, the filing of complaint, in my view, brings more urgent attention and focus to the need to resolve a complainant client's outstanding affairs promptly.

---

[23] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 4.2.1(d).

[164] The need to ensure prudent and careful management of clients' funds, when entrusted with the care of those funds, sits high on the list of a practitioner's obligations.

[165] In the face of instruction to return funds held on account of fees, it would be a rare circumstance in which a practitioner could reasonably and properly resist request to return a client's funds.

[166] I have given careful consideration as to the explanations provided by Mr AW and do not find them persuasive. Funds were retained by Mr AW in September 2009. Some three years later, at which time complaints were lodged, no progress had been made. Following a meeting with Mr DV in December 2012, Mr AW reports that he had received instructions to continue with his investigations, despite the fact that he was aware at that time of the considerable difficulties that would be faced in enforcing a judgment against the former directors who were residing in [[Overseas]]. The inability of the company's liquidator to provide financial accounts is seemingly tolerated for a number of years, and it is uncertain as to whether any report is ever provided to Mr AW from the liquidator. Mr AW's brief to investigate the prospect of recovery is materially assisted by his engagement as counsel for the liquidator in High Court proceedings, at which time he is aware both that the liquidator has advised that there are meagre assets available for distribution, and that the liquidation is about to be concluded.

[167] Mr AW argues that he is bound by a collective arrangement which precludes him from refunding monies held unless he receives unanimous instructions, despite the fact that he received instructions from a group of individuals who give no indication that they agree to be collectively bound to continue to instruct Mr AW. When Mr AW concludes that he is in a position to end the retainer, the opinion he provides to his clients in support of argument that it would be imprudent for them to risk further litigation, relies heavily on information that was available to Mr AW some considerable time prior to him bringing matters to conclusion. Overarching all these arguments, is submission that he was prevented from returning money to his clients because he was obliged to take no steps until the disciplinary process had run its course.

[168] Section 110(1) of the Act directs that a practitioner who, in the course of his or her practice, receives money for, or on behalf of any person, must hold the money, or ensure that the money is held, exclusively for that person, to be paid to that person or or as that person directs.

[169] A failure to take steps to refund funds held (allowing of course for deduction of appropriate fee) on request, constitutes a breach of s 110(1)(b). It represents a failure to act in accordance with instructions received.[24]

[170] In my view, Mr AW's failure to return funds to his clients on request, constitutes unsatisfactory conduct. It is 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, and breached his obligations under s 110(2)(b) of the Act, to deal with funds held as directed by his clients.

Orders

[171] A finding of unsatisfactory conduct has been made. In light of this I must consider the appropriate penalty. By s 211(1)(b) of the Act, I am able to make any orders that could have been made by a Standards Committee.

[172] In considering appropriate penalty, I have regard to one of the purposes of the Lawyers and Conveyancers Act 2006 which is to protect the consumers of legal services (s 3(1)(b)). The requirements of the Conduct and Client Care Rules, the Trust Account Regulations, and the Act must be complied with, and this breach (1)(b) should not be considered to be inconsequential.

[173] The function of a penalty in a professional context was recognised in *Wislang v Medical Council of New Zealand* as being to punish a practitioner, to act as a deterrent to other practitioners, and to reflect the public's and the profession's condemnation or disapproval of a practitioner's conduct. It is important to mark out the conduct as unacceptable and to deter other practitioners from failing to pay due regard to their professional obligations.

[174] The most appropriate way to fulfil the functions of a penalty in these circumstances is by the imposition of a fine. Section 156(1)(i) of the Act provides for a fine of up to $15,000.00 when unsatisfactory conduct is found. For a fine of that magnitude to be imposed it is clear that some serious wrongdoing must have occurred. In allowing for a possible fine up to that amount, the legislature has indicated that breaches of professional standards are to be taken seriously and instances of unsatisfactory conduct should not pass unmarked.

[24] Preface to Conduct and Client Care Rules direct that a lawyer must act competently, in a timely way, and in accordance with instructions received and arrangements made.

[175] In an earlier LCRO decision *Workington v Sheffield*,[25] the LCRO noted that a fine of $1,000.00 is a proper starting place where unsatisfactory conduct has been found as a result of a breach of applicable Rules (whether the Conduct and Client Care Rules, the Regulations or the Act.)

[176] I consider a fine of $4,000 to be appropriate. In reaching that view I have considered the factors described at [173] above, the importance of compliance with s110 (1) of the act, and the particular circumstances of the retainer.

Costs

[177] Where a finding has been made against a practitioner it is appropriate that a costs order in respect of the expenses of conducting a review be made. In making this costs order I take into account the Costs Orders Guidelines published by this Office. The practitioner is ordered to pay costs in the sum of $1,200.

Decision

[178] The decision of the [City] Standards Committee [X] is modified as follows:

(a) Pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006, the determination of the Standards Committee to take no further action in respect to complaint of failure to release funds is reversed.

(b) By reason of a breach of s 110(1)(6) of the Lawyers and Conveyancers Act 2006, Mr AW's conduct constitutes unsatisfactory conduct, pursuant to ss 12(a) and 12(c) of the Act.

(c) Pursuant to s 156(1)(i) of the Act Mr AW is ordered to pay the sum of $4,000 to the New Zealand Law Society within one month of the date of this decision.

(d) Pursuant to s 209(1)(a) of the Act, the Committee's decision to take no action on complaint as to the reasonableness of fees charged is reversed and the Committee is directed to reconsider that aspect of the complaint, with recommendation that a costs assessor be appointed.

[25] *Wislang v Medical Council of New Zealand* [2002] NZAR 573 (CA).

(e) Pursuant to s 210(1) of the Lawyers and Conveyancers Act 2006 and the LCRO Costs Orders Guidelines, Mr AW is ordered to pay the sum of $1,200 to the New Zealand Law Society by way of costs, such sum to be paid within one month of the date of this decision.

(f) In all other respects, the decision of the Standards Committee is confirmed.

DATED this 16th day of December 2016

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:

DV, RL, YS and TB as the Applicants
AW as the Respondent
MQ as representative for the Respondent
HK as representative for the Applicants
CJ as a related person
[City] Standards Committee [X]
The New Zealand Law Society
Secretary for Justice