LEGAL COMPLAINTS REVIEW OFFICER
ĀPIHA AROTAKE AMUAMU Ā-TURE

[2021] NZLCRO 059

Ref: LCRO 048/2019

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the [Area] Standards Committee [X]
BETWEEN	**VW** Applicant
AND	**EX and TY** Respondent

DECISION

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

Introduction

[1] Mr VW has applied for a review of a decision by the [Area] Standards Committee [X] (the Committee) to take no further action in respect of his complaint concerning the conduct of the Ms EX, and Mr TY, a partner and associate respectively with [Law Firm] (the firm).

[2] Mr VW and his wife were the owners of a residential unit being one of a number in a unit title complex adversely affected by weathertight problems since 2002, a year after completion of construction of the complex in 2001.[1]

[1] There are [redacted] units, comprising two and three storey townhouses constructed in [redacted] separate blocks. This background information was detailed by the High Court in its interim judgment, *[case citation removed]*.

[3] From February 2015, Ms EX, and later Mr TY, represented Mr and Mrs VW, and several other unit owners (the appellants), in their opposition to the body corporate's (BC) application for a reinstatement scheme pursuant to s 74 of the Unit Titles Act 2010 (UTA), first in the High Court, and then in the Court of Appeal.[2]

[4] Mr VW alleges Ms EX and Mr TY (a) wrongly advised him and his co-appellants to appeal the High Court's interim judgment, and (b) overcharged them by invoicing them nearly double the fee estimate provided for the appeal.

[5] In 2008 the BC initiated proceedings in the Weathertight Homes Tribunal (WHT). Unit owners, including Mr and Mrs VW, and those unit owners who later opposed the BC's proposed s 74 scheme, were parties to those proceedings.[3] The claim was referred to mediation which took place on 4 and 5 October 2010, and settled on 29 October 2010.

[6] At an extraordinary general meeting of the BC on 5 February 2011 some unit owners contended that in raising levies, and proposing to distribute the settlement funds, the BC had not taken into account (a) the actual cost of repairs to individual units, or (b) contributory negligence by some unit owners who had caused the final settlement amount to be reduced.[4]

[7] To resolve those matters, the lawyer at that time for both the BC and unit owners prepared a remedial works agreement (RWA) to provide for payment of any shortfall in the settlement funds in respect of the "shared costs" of those unit owners who had settled their WHT claims. A special levy would be made on those "who ha[d] a contributory negligence [percentage] allocated against their claim".[5]

[8] The reinstatement works commenced in July 2011. By July 2012, the estimated costs had increased to $11.5 million. At that time, some unit owners expressed dissatisfaction about the distribution of the settlement funds, and with the special, or top up, levies not being calculated on unit entitlements.[6]

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[2] The appellants were Mr and Mrs VW, Ms KU, Mr YZ and Ms LK, and Mr FG.
[3] 88 unit owners opposed, and the remaining 9 unit owners were either not being involved in the WHT proceedings, or withdrew before the claim was settled.
[4] At that meeting it was reported that the most competitive tender received for the remediation work was $8.45 million, including an allowance of $500,000 for professional fees.
[5] See the RWA at clause 9.4: the contributory negligence percentage deductions of each settlement unit owner were set out in Schedule 3.
[6] At BC extraordinary general meetings (16 June 2012 and 7 July 2012).

[9] By 31 May 2013, the BC had insufficient funds to continue the reinstatement and the contractor stopped work. The unit owners could not agree how the BC would pay for the shortfall as provided in the RWA. The impasse was referred to mediation which took place on 17 November 2013.

[10] On 9 August 2014, the BC resolved to draft a s 74 scheme, and levied unit owners in accordance with that proposal.[7] The majority of unit owners paid those levies. The contractor recommenced the reinstatement work on 3 November 2014.

[11] As noted above, from February 2015, Ms EX, and later Mr TY, represented a group of unit owners, including Mr and Mrs VW, in their opposition to the BC's proposed s 74 scheme.

[12] In its interim judgment issued on 3 September 2015, the High Court declined to approve the BC's s 74 scheme, and invited the parties to submit a scheme incorporating the Court's requirements, and request consent orders, or alternatively, to submit memoranda stating their respective positions. The BC approved a proposed s 74 scheme in accordance with the High Court's requirements on 8 November 2015.[8]

[13] The appellants met with, obtained advice from, and provided their instructions to Ms EX and Mr TY to appeal the High Court's interim judgment. This was heard by the Court of Appeal on 16 June 2016.

[14] In a minute issued on 24 June 2016 the Court of Appeal indicated "the appeal would be dismissed for want of jurisdiction", and suggested a "practical course" whereby the parties, by 14 July 2016, would seek in the High Court "an urgent consent order" approving a s 74 scheme in accordance with the requirements in the High Court's interim judgment, which could provide a jurisdictional basis for the appeal.[9]

[15] That did not happen. On 23 September 2016 the Court of Appeal, having considered the parties' submissions, dismissed the appeal.[10]

Complaint

[16] Mr VW lodged a complaint with the Lawyers Complaints Service (LCS) on 18 January 2018.

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[7] At BC extraordinary general meeting (9 August 2014) – Proposal B.
[8] At BC extraordinary general meeting (8 November 2015).
[9] *[case citation removed]*, 24 June 2016 [Minute] at [3], [4].
[10] *[case citation removed]* at [1]–[3], [12]–[14], and [32]–[36].

(1) Act competently

[17] Mr VW claimed Ms EX and Mr TY wrongly advised him he could appeal against the High Court's interim judgment. He said having appealed, the Court of Appeal declined jurisdiction.

[18] He also claimed Ms EX and Mr TY did not produce an "important witness" in the High Court proceedings.

(2) Fees

[19] Mr VW alleged Ms EX, and Mr TY, having wrongly advised the appellants to appeal, charged them "nearly double" the fee estimate. He said he could not then afford to appeal the High Court's final judgment, or respond to the BC's appeal which succeeded thereby causing him further loss, and he ought not be required to pay their fees.

(3) Fee estimate

Appeal – Court of Appeal

[20] Mr VW said having estimated legal fees from $35,000 to $45,000 for the appeal, Ms EX's and Mr TY's "total cost[s]" of $105,241.37 were "unacceptable".

Rehearing - High Court

[21] He queried Ms EX's and Mr TY's fees in their 2 November 2016 invoice claiming they overcharged him by that amount. He said based on their practice of monthly billing, he could not reconcile that invoice with their 31 October 2016, and 1 December 2016 invoices. He asked why they did not, as they "normally" did, note the date of each attendance in the invoice narration for the 2 November, and 1 December invoices.[11]

Response

[22] I refer to Ms EX's, and Mr TY's response in my later analysis.[12]

[11] Invoices (31 October 2016 for $3,885 plus GST; 2 November 2016 for $7,000 plus GST; 1 December 2016 for $13,630 plus GST).
[12] Ms EX and Mr TY, letter (by email) to LCS (14 February 2018).

Standards Committee decision

[23] The Committee delivered its decision on 22 March 2019, and determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

(1) Act competently

[24] The Committee determined that although Ms EX and Mr TY "might have made a mistake", that "did not rise to the level of incompetence" and therefore they had not contravened r 3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

[25] In reaching that decision, the Committee observed (a) neither the BC, nor the Court of Appeal identified the issue before or during the Court of Appeal hearing which "evidenced" the "issue of jurisdiction was unclear", and (b) although not followed by the Court of Appeal, legal precedent supported the appeal of the High Court's interim decision.

[26] In the Committee's view, it was reasonable for Ms EX, and Mr TY to rely on that legal precedent, and it was "only with the benefit of hindsight" it had become "clear" the appeal could not be made at that time.

(2) Fees

(a) Fair and reasonable

[27] The Committee decided that having reviewed Ms EX's, and Mr TY's files, their fees, for the purposes of r 9 of the Rules, taking into account the identified fee factors in r 9.1, were fair and reasonable.

[28] The Committee stated it was "satisfied" with Ms EX's and Mr TY's "explanation" that "unexpected matters which arose during the appeal" accounted for their fee estimate of $35,000 to $45,000 for the appeal being exceeded, noting the "remaining fees" of $40,237.50 plus GST and disbursements were "within the estimate".

[29] The Committee said it was also satisfied Ms EX and Mr TY "had not double-charged" in their 31 October 2016 invoice which concerned the appeal, and their 2 November 2016 invoice which concerned "finalis[ing] the Scheme".

(b) Estimate

[30] In reaching the conclusion Ms EX and Mr TY had not contravened r 9.4 of the Rules, the Committee stated (a) Ms EX and Mr TY had provided Mr VW with "a clear indication" of the legal work "included in the estimate" based on the "usual work required" excluding "unexpected issues", and "warned" him fees for the appeal "could increase due to unexpected issues", and (b) the additional legal work carried out by them was not "within" the estimate, which was "not exceeded".

[31] Although noting "a significant amount" of Ms EX's and Mr TY's legal work had been "outside the scope of the work covered by the estimate", the Committee was "satisfied" with their explanation the "additional appeal issues" were (a) "largely unknown and unpredictable", (b) "could not have been foreseen", and (c) the "actual fees for the appeal were within the estimate".

[32] The Committee stated Mr VW, and the other unit owners, had been "provided with regular invoices" and therefore were "fully informed of the additional costs as they arose".

Application for review

[33] Mr VW filed an application for review on 15 April 2019. He seeks findings of unsatisfactory conduct against Ms EX and Mr TY for (a) not acting competently, and (b) overcharging him by exceeding their fee estimate.

[34] He explains he and his family had suffered psychologically for the past seven years due to the weathertight, and reinstatement issues. He says he had paid legal fees of approximately $40,000 to Ms EX and Mr TY, as well as "over $90,000 plus about $10,000 interest" to the body corporate.

[35] He seeks a refund of $29,950.18 comprising fees invoiced and paid, plus interest.[13]

(1) Act competently

[36] Mr VW maintains Ms EX and Mr TY did not act competently. He disagrees with the Committee's conclusion that in advising him and his co-appellants to appeal the High Court's interim judgment, described by him as a "mistake", Ms EX and Mr TY did not contravene r 3.

[13] Fees of $24,752.22, plus interest at 10% per annum on that amount for two years – $5,197.96.

(2) Fees - fair and reasonable, estimate

[37] He says by not acting competently, Ms EX and Mr TY had overcharged him.

Response

[38] In their response, Ms EX, and Mr TY repeat that there was authority in an earlier Court of Appeal decision for the appeal of the High Court's interim judgment, and senior counsel for the BC agreed the Court of Appeal had jurisdiction.[14]

[39] They say Mr VW "unreasonably refused" the "practical solution" suggested by the Court of Appeal whereby he, and his co-appellants, seek consent orders from the High Court for the s 74 scheme which "conformed with" the High Court's interim judgment.

Review on the papers

[40] The parties have agreed to the review being dealt with on the papers. This review has been undertaken on the papers pursuant to s 206(2) of the Act, which allows a Legal Complaints Review Officer (LCRO) to conduct the review on the basis of all information available if the LCRO considers that the review can be adequately determined in the absence of the parties.

[41] I record that having carefully read the complaint, the response to the complaint, 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. On the basis of the information available I have concluded that the review can be adequately determined in the absence of the parties.

Nature and scope of review

[42] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:[15]

> … 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

[14] Ms EX, letter to LCRO (13 May 2019).
[15] *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].

> Committee or an investigator and seek and receive evidence. These powers extend to "any review" …
>
> … the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[43] More recently, the High Court has described a review by this Office in the following way:[16]

> 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.

[44] 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 consider all of the available material afresh, including the Committee's decision; and provide an independent opinion based on those materials.

Issues

[45] The issues I have identified for consideration are:

(a) Did Ms EX, and Mr TY, when representing the appellants, including Mr VW, on the appeal of the High Court's interim judgment to the Court of Appeal, act competently and in a timely manner consistent with the terms of their retainer and the duty to take reasonable care? (r 3, s 12(a) of the Act)

(b) Did Ms EX, and Mr TY, in respect of their legal work on that appeal, charge Mr VW, and the other unit owners, fees that were fair and reasonable? (rr 9, 9.1, 9.4)

(c) Did Ms EX, and Mr TY provide an estimate of those fees, and if so did they inform Mr VW promptly if it became apparent the estimate was likely to be exceeded? (r 9.4)

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

Analysis

(1) Act competently – issue (a)

(a) Parties' positions

[46] Mr VW claims Ms EX and Mr TY wrongly advised the group of unit owners, including him and Mrs VW, it was open to them to appeal the High Court's interim judgment, and by giving that advice did not act competently.

[47] Ms EX and Mr TY disagree. In their submission the Court of Appeal "was in error" in declining jurisdiction, and they would have expected the Court to raise that issue at the hearing.

(b) Pre-appeal advice

Meetings, initial advice

[48] In September 2015, following the issue of the High Court's interim judgment, Ms EX and Mr TY met with, and provided written advice to the group, about the group's options, including an appeal.

[49] At the meetings on 8 and 9 September 2015, Ms EX advised it was "unlikely" another Judge would have reached a different conclusion. Ms EX advised issues they "would potentially consider challenging" were (a) allocation of reinstatement costs "according to unit type rather than unit entitlement", and (b) the contributory negligence findings.[17]

[50] Ms EX explained they would have to pay for their costs on the appeal, and if they lost they would "also have to pay [the BC's] costs" which "would erode" the benefit "gained" from the interim judgment. She explained the "issue" for the Court was "fair[ness] between all owners" in respect of which "common property ought to be allocated according to unit entitlement".

[51] Ms EX advised the group (a) to accept the "new allocations of repair costs" less "the contributory percentages" hand written by her on "proposal A" which, apart from incorporating the contributory negligence percentages in the RWA required by the Court,

[17] Meetings, Ms EX on 8 September 2015, with Mr VW, [names redacted]; on 9 September 2015 with [names redacted]. Ms EX, emails to the group (8 and 9 September 2015).

was “essentially” what the Court “proposed”, and (b) the amended scheme required by the Court would provide them with “a greater allocation of settlement costs”.[18]

[52] Ms EX recommended, and asked for the group’s instructions to pay, on account, the reinstatement levies from their respective funds held in the firm’s trust account for that purpose.[19]

[53] Following the third client meeting on 18 September 2015, Mr TY asked the group whether they either “accept[ed]” the High Court’s interim judgment “in principle”, or wanted to appeal. He explained the High Court did not approve the BC’s proposed s 74 scheme “mainly” because reinstatement to common property was not taken into account.[20]

[54] He advised by appealing they “risk[ed] part if not all” of the benefit of the interim judgment which did not provide them with an “opportunity” to “renegotiate the entire basis” of the s 74 scheme. He said it was for them to “ensure” the BC implemented the Court’s directions.

[55] He advised the BC’s proposed s 74 scheme, prepared at his request, was “a starting point” how “the contribution by each owner will be calculated”. He said their appeal would be “limited to the evidence” put before the High Court. He provided his reasons on their “prospect of success” on appeal.

[56] In response to the group's request for advice about their options if they did not appeal, Mr TY advised their reinstatement levies would be calculated “in accordance with the contributory negligence percentages in the [BC’s] draft scheme” incorporating the High Court’s findings.[21]

[57] On 4 October 2015, Mr TY confirmed the appellants’ instructions to appeal which he advised was “confined” to the “application of contributory negligence”. He asked if they wanted to “fast track” their appeal.[22]

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[18] Ms EX, email to the group (9 September 2015). Ms EX also advised Mr and Mrs VW, and the other respondents to accept the GST calculation which would "give [them] a larger allocation" because those unit owners to whom the contributory negligence percentages applied would "pay more of the shortfall", and therefore "receive a greater portion of the GST".

[19] Ms EX, email to Mr VW and others (11 September 2015).

[20] Meeting, Mr TY on 18 September 2015 with [names redacted], letter (by email) to the group (23 September 2015).

[21] Mr TY, emails to Mr VW and others (25, 28, 29 (x3), and 30 September 2015).

[22] Mr TY, letter (by email) to the appellants (4 October 2015). This also included advice of (a) the requirement to serve the appeal on all unit owners (and their mortgagees and caveators), and (b) of payments required (i) from each them for security for costs, (ii) the court fees (filing the appeal, directions for service, and a hearing date) and disbursements.

Appeal costs

[58] Ms EX and Mr TY again met with members of the group on 22 October 2015. Later that day Mr TY explained to them, and the other group members, including Mr VW, that the number of those who appealed, would determine how the legal costs would be shared.[23]

[59] Ms EX advised for those who withdrew, it would be "an act of good faith" by them to "pay the money due" under the BC's proposal thereby reducing the "risk" of incurring a penalty on such amounts. On 30 October 2015, Ms EX recorded her understanding three members of the group intended to withdraw from the appeal.[24]

Appeal issues

[60] During November and December 2015 Ms EX and Mr TY repeated their advice (a) the appellants' evidence on the appeal would be limited to that heard by the High Court relevant to the appeal, and they could not produce further evidence, (b) it was in their best interest, subject to conditions, to pay their respective levies pending the outcome of the appeal; and advised them (c) to agree to the BC's request for a priority fixture.

[61] Mr SJ (another appellant), and Mr VW declined to pay the levies at that time.[25]

[62] On 28 November 2015 Ms EX recorded the group's instructions (a) "all" would continue with the appeal, but the costs would be shared by the appellants, and (b) to oppose the BC introducing further evidence.[26] On 4 December 2015 Mr SJ said having met the previous evening, the appellants would continue with the appeal.

Appeal

[63] In the lead up to the appeal hearing on 16 June 2016, Ms EX, reinforced by Mr TY, continued to "impress" on the appellants to "reduce" the "penalties and interest" they would otherwise "be exposed to", they should pay the levy as if "successful on appeal".[27]

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[23] Meeting, Ms EX and Mr TY on 22 October 2015, with [names redacted], email to the group (22 October 2015).
[24] Ms EX, email to the group (30 October 2015). Ms EX sent the clients the firm's invoice "to date" on the appeal "split equally" among them stating there were "sufficient funds in trust" for payment.
[25] Emails from Mr SJ (x2), Mr VW, and Mr FG to Mr TY, Ms EX, cc Mr VW and others (23 November 2015, and 14, 15, and 16 December 2015).
[26] Also, that day, Mr TY forwarded (by email) them a cost sharing agreement.
[27] Ms EX, email to the appellants (4 April 2016); Mr TY, email to the appellants (22 April 2016).

(c) Discussion

Mr VW

[64] Mr VW says the Court of Appeal decided Ms EX and Mr TY were "wrong" from "the beginning to the end". He says he does not understand how or why they did not know an appeal could not be made from an interim judgment which he considers "elementary knowledge of the law".

[65] He says the consequences of Ms EX and Mr TY having adopted "the wrong legal process" were that he (a) still had to pay their legal costs for the appeal, and (b) "could not afford" to proceed with his proposed s 74 scheme which the High Court declined to approve. He says he also had to pay a proportion, as a unit owner, of the BC's legal fees on the appeal.

[66] He says he disagrees both with (a) the Committee's conclusion that although Ms EX and Mr TY "might have ma[d]e a mistake", their conduct in doing so "did not rise to the level of incompetence" and (b) the authority cited by the Committee that lawyers "sometimes err in their judgment".[28]

[67] He acknowledges "law is not a science", but says, in effect, the practice of law is not analogous with a "scientific experiment" where "fail[ures]" are accepted as a means of achieving the scientific aim.

[68] He disagrees that Ms EX and Mr TY, and the BC's counsel, were not aware of the "jurisdiction" issue, and that "only with the benefit of hindsight it became clear" the High Court's interim decision could not be appealed.

[69] Mr VW says the Court of Appeal made the "practical" suggestion the parties obtain "an urgent consent order" from the High Court approving a s 74 scheme incorporating the High Court's "proposals", but the High Court required a rehearing.

Ms EX, Mr TY

[70] Ms EX, and Mr TY explain Mr VW instructed them to oppose the body corporate's s 74 scheme. They say the interim judgment provided "partial success" for Mr VW insofar as the Court "could not grant" the BC's s 74 scheme "until modified".

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[28] Duncan Webb *Ethics, Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at 353 was referred to by the Committee.

[71] They say they explained to the group, including Mr VW, the issues could not be relitigated until the High Court had "approv[ed] an amended scheme", and therefore advised them to appeal.

[72] They say they filed "detailed written submissions" ahead of the hearing on 16 June 2016, but the Court of Appeal subsequently "ruled" it did not have jurisdiction "until formal orders were granted" by the High Court.

[73] They explain they advised the appellants they disagreed with the Court of Appeal's decision, but the Supreme Court, on appeal, would "likely" agree with the Court of Appeal, and therefore the "more practical and cost-effective route" was to obtain the consent orders suggested by the Court of Appeal.

[74] However, Ms EX and Mr TY say because the appellants did not accept that course was in their "best interests", and would not prejudice their "rights", the appellants did not provide further instructions, and the Court of Appeal dismissed the appeal.

[75] Ms EX and Mr TY say despite the appellants' instructions to subsequently contest the BC's proposed s 74 scheme, that proposal, which incorporated the "adjust[ments]" required in the interim judgment, was approved by the High Court in its final judgment.

Professional rules

[76] The purposes of the Act include maintaining public confidence in the provision of legal services, and protecting the consumers of legal services. To that end, "unsatisfactory conduct" by a lawyer includes, in s 12(a) of the Act, "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".[29]

[77] This professional standard been described as "an articulation of the well-established reasonable consumer test which focuses not on the views of professional people (i.e., a peer based standard) as to proper standards, but the reasonable expectations of ordinary people".[30]

[78] Aligned with those provisions, r 3 provides that "[i]n 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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[29] Sections 3(1) and 12(a) of the Act.
[30] Duncan Webb, *Unsatisfactory Conduct* (September 2008): "While in practice the two [standards] will frequently converge, the shift in focus is an important signal".

Consideration

[79] The essence of this aspect of Mr VW's complaint is whether by advising the appellants it was open to them to appeal the High Court's interim judgment, Ms EX and Mr TY acted competently.

[80] Ms EX and Mr TY agree with the Committee's decision they "had not failed to execute the retainer with due care and competence". In their submission, the Court of Appeal erred on the jurisdiction issue. They rely on a previous Court of Appeal decision concerning s 74 schemes as authority the Court of Appeal had jurisdiction to hear the appeal.[31]

[81] A lawyer's duty to act competently has been described as "the most fundamental of a lawyer's duties" in the absence of which "a lawyer's work might be more hindrance than help". However, this does not impose "a high level of service to clients", but rather, "in reality, [is] a duty not to be incompetent … aimed at ensuring minimum standards of service".[32] The duty is concerned with "the outcome of lawyer's work rather than the way in which they deal with clients".[33]

[82] However, lawyers are not infallible and may make errors of judgment, or in law. They do not provide guarantees of their work to their clients.[34]

[83] Importantly, for the purposes of this review, where a complainant alleges a lawyer has made a "fundamental error of law", the question is whether this reflects on the lawyer's competence.[35]

[84] A glaring mistake by a lawyer, shown to have been palpably wrong, may lead to a finding the lawyer did not act competently, or even result in a negligence claim by the lawyer's client. But if the error of judgment, or mistake in the law concerns an "unclear, or complex" issue or point, the lawyer concerned "cannot be said to be incompetent".[36]

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[31] *Tisch v Body Corporate No 318596* [2011] 3 NZLR 679 (CA) – an appeal of an interim High Court decision where the scheme terms proposed by the body corporate had not been approved.
[32] Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at [11.1].
[33] At [11.3].
[34] See discussion by Webb, above n 32 at [11.4.1] and [11.4.2].
[35] At [11.4.2].
[36] At [11.4.1].

[85] Similarly, it does not necessarily follow that because a Court disagrees with a lawyer's argument or position, that the lawyer did not act competently in bringing the argument.[37]

[86] In that regard, Ms EX and Mr TY say they "would have expected" the Court to have raised the jurisdiction issue, which they say they considered "at the outset", during the hearing. They say during the judicial telephone conference following the hearing they, and the BC's (senior) counsel, informed the Court they did not "believe" there was a jurisdiction issue.

[87] In their submission, having heard from the parties on that issue, the Court of Appeal could have decided that matter without "wast[ing] costs" on the appeal.[38]

[88] They explain the Court of Appeal issued its 24 June 2016 minute because it did not consider as final the High Court's interim judgment concerning the "allocation" of the reinstatement costs, and the "binding nature" of the RWA.

[89] Ms EX and Mr TY submit (a) there was precedent for the appeal, and (b) senior counsel for the BC neither opposed the appeal, nor "t[ook] up" that issue when raised by the Court of Appeal after the hearing.

[90] For those reasons, they say it was "reasonable" for them to "conclude" the appellants "were able to appeal" the interim judgment, and although considering an appeal to the Supreme Court, they advised the appellants the Court of Appeal's "practical proposal" was the "better route".

Conclusion

[91] It is important to emphasise that neither the Committee's hearing of Mr VW's complaint, nor this review provides a forum for the parties to re-argue the jurisdiction issue determined by the Court of Appeal.

[92] The task of the Committee was, and my task on review is to determine whether, on the information produced, Ms EX and Mr TY, when advising the appellants on their options following the High Court's interim judgment (a) did so in a manner that did not fall below the professional standard of "competence and diligence" referred to earlier, and (b) acted competently as required by r 3.

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[37] At [11.4.2].
[38] *Bayly v Hicks* [2012] NZCA 589, concerning an interim decision of the High Court arising out of a property dispute.

[93] In summary, following the 16 June 2016 hearing, the Court of Appeal "raised", in its 24 June 2016 minute, "whether there was jurisdiction" to determine the appeal. The BC then proposed a s 74 scheme based on the High Court's interim judgment. The appellants did not agree with that proposal and put forward, to the High Court, a timetable for the parties to make submissions on the appellants' proposal.

[94] However, the High Court subsequently stated, in a minute, that because "nothing had been agreed, no consent orders could be made". Ms EX and Mr TY then made submissions on the jurisdiction point to the Court of Appeal which issued its judgment on [date redacted] declining jurisdiction.

[95] From my consideration and analysis of the information produced, I have decided not to take any further action on this aspect of Mr VW's complaint.

[96] In reaching my decision, I note that the circumstances of this review are not unlike the helpful decision referred to by the learned author above where the legislation in that matter was "very far from straightforward", the lawyers had not "approached the case in a careless way", the judge had made the same error, and opposing counsel did not consider the lawyers' argument "unsustainable". In that case following two days of argument, and having reserved judgment, the court obtained "a clear view of the legal point".[39]

[97] Similarly, concerning this review, the Court of Appeal did not raise the jurisdiction issue until after the 16 June 2016 hearing, and at a later date, having received submissions and heard argument, delivered its reserved judgment declining jurisdiction.

[98] Finally, and for completeness on this aspect of Mr VW's complaint, it is to be noted that because a lawyer also owes his or her client a duty of care in tort (and in contract), a cause of action in negligence may lie if the lawyer does not achieve the standard of competence "expected by law".[40]

[99] However, any action in negligence (or contract) brought by a client against his or her lawyer claiming loss is heard, or tried, by the Courts before whom evidence, frequently including expert evidence, can be tested by cross examination.

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[39] *Ridehalgh v Horsefield* [1994] Ch 205 at p244. See Webb at [11.4.2].

[40] GE Dal Pont *Lawyers' Professional Responsibility* (6th ed, Thomson Reuters, Sydney, 2017) at [5.05] and [5.10] – the retainer between a lawyer and his or her client has been described as "substantiat[ing] the existence of the relationship that has given rise to that duty", and contains "the scope of the lawyer's duty of care".

[100] This contrasts with the disciplinary process which is inquisitorial and investigative, and does not sufficiently allow for the testing by cross-examination of evidence as is required for the just resolution of significant civil disputes.

[101] Although decisions of Standards Committees, and Review Officers have frequently stated the complaints process is not an alternative to court proceedings, if arising out of an action in negligence brought by a client against a lawyer there are issues or doubts about the lawyer's competence, then it may be open to the client to lay a complaint with the Lawyers Complaints Service at that time.

(2) Fees – fair and reasonable, estimate – issues (b), (c)

[102] Because these issues interrelate, I will consider them together.

(a) Parties' positions

[103] Mr VW claims having provided the group with a fee estimate of $35,000 to $45,000 for the appeal, Ms EX's and Mr TY's overall fees of $105,241.37 were "unacceptable", and the appellants had been overcharged.

[104] Ms EX and Mr TY say by the end of the appeal hearing on 16 June 2016, their fees for attendances which concerned the appeal itself were $53,577.52 plus GST (total $61,614.15) which incorporated an allowance (or reduction) of their recorded time to the value of $8,096 plus GST.

(b) Chronology

[105] In his 23 September 2015 letter to the group, Mr TY estimated fees on the appeal of $35,000 to $45,000 divided among those of them who decided to appeal. He asked for a retainer of $5,000 from each of them. He advised if they lost they may be liable to pay the BC's costs of "around $15,000".[41]

[106] Mr TY confirmed the estimate in his 4 October 2015 letter, and requested they each pay the $5,000 retainer by 16 October 2015. He enclosed the firm's terms of engagement, noting "a number" of the group were "behind" with payment of the firm's invoices for the High Court proceedings.

[41] Unless otherwise stated, all communications were by email.

[107] He informed them they would each have to pay security for costs. He said the firm had paid the appeal filing fee, and directions for service fees, and a hearing fee was payable.

[108] On 22 October 2015 Mr TY again confirmed (by letter) the fee estimate. He reminded them the amount they each paid depended on the number of them who appealed, and the requirement to pay security for costs. Ms EX informed the appellants on 28 November 2015 they would share payment of the appeal legal costs.[42]

[109] On 4 December 2015, Mr SJ informed Mr TY, and Ms EX that having met the previous evening, the appellants would "still carry on" with the appeal, and "pay for all related cost[s]".[43] By that stage Ms EX and Mr TY had issued invoices for fees of $16,157.50 plus GST.[44]

[110] Mr TY asked the other members of the group on 6 December 2015 whether they intended staying with the appeal, and whether one of them would pay her reinstatement levy on account.

[111] On 15 December 2015 Ms EX asked the group whether, as she recommended, they would pay their reinstatement levies on account. In reply that day Mr SJ repeated his 4 October 2015 instructions to "follow due process to deal with the appeal".

[112] On 28 April 2016, Ms EX informed the appellants how the firm's 29 February 2016 invoice should be apportioned.

[113] A month later, on 25 May 2016, Ms EX informed those of the group who had not paid their share of the firm's 30 November 2015 invoice, and on 31 May, provided the appellants with her invoice for "preparation of argument". By that stage Ms EX and Mr TY had issued invoices for fees of $45,377.50 plus GST.[45]

[114] Ms EX and Mr TY explain that by the end of the appeal hearing on 16 June 2016 their fees had accumulated to $53,577.52 plus GST (total $61,614.15) which, as noted earlier, incorporated an allowance (or reduction) of their time recorded.[46] By 30 June 2016, their fees had reached $54,377.50 plus GST.

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[42] Also, that day, Mr TY forwarded the group an agreement to sign concerning the sharing of the appeal costs.
[43] Mr SJ stated if the three other members of the group wanted to join the appellants they would "need to pay their appeal cost[s] themselves", including "cost[s] for losing the appeal".
[44] [Law Firm] invoices (30 October 2015 for $10,895 plus GST; 30 November 2015 for $5,262.50 plus GST).
[45] An additional four invoices, 22 December 2015 for $3,080 plus GST; 29 February 2016 for $5,140 plus GST; 29 April 2016 for $6,000 plus GST; and 31 May 2016 for $15,000 plus GST.
[46] Allowance (or reduction) to the value of $7,744.34 plus GST (total $8,096).

[115] On 5 July, Ms KU, and Mr VW expressed their disappointment the Court of Appeal had raised the jurisdiction issue. They explained their requirements for the s 74 scheme, and what they would be prepared to accept.

[116] On 7 July Mr SJ said the appellants were "happy to try" to settle the matter, but would "still carry on the appeal". On 11 July Mr VW provided the appellants' memorandum for the reconvened High Court hearing, and in a second email that day reaffirmed his previous instructions of their opposition to the BC's proposed s 74 scheme.

[117] On 23 September 2016 the Court of Appeal dismissed the appeal. Following the second hearing on 9 December 2016, the High Court, in its final judgment issued on 14 December 2016 approved the BC's re-drafted s 74 scheme.[47]

[118] Mr VW raised his first query about the firm's fees on 3 April 2017 when he requested "verification" of the total appeal costs for two of the appellants, together with all invoices. On 19 June 2017 Mr TY requested payment of the firm's invoices listed in his 21 March email. The following day, in response to Mr VW's query, he explained the firm's attendances were "detailed" on each invoice.

[119] The appellants' first complaint about the firm's fees on the appeal (and the second High Court hearing) was made by Mr SJ on 26 June 2017.

[120] Mr VW (and Mr FG) paid the balance of his share of the firm's fees during November 2017. On 21 November 2017 Mr TY declined, out of "fairness" to the other appellants, Mr VW's request for a "discount".

(c) Lawyers' fees – professional rules

Fair and reasonable

[121] Lawyers are prohibited by r 9 from charging their clients "more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1".

[122] The fee factors in r 9.1 "formalise what was considered to be best practice" in determining a fair and reasonable fee before the introduction of Rules.[48] Importantly, for the purposes of this review, one of the fee factors, in rule 9.1(j), requires that "any quote or estimate of fees given by the lawyer" be taken into account in that determination.

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[47] *[case citation removed]* at [56] to [58].
[48] *AQ v ZI* LCRO 105/2010 (February 2011) at [75] – "… costing guidelines were included in a New Zealand Law Society publication referred to as New Zealand Law Society Property Transactions: Practice Guidelines 2003".

[123] The approach to determining whether a fee is fair and reasonable is "(a) a global approach" whereby:[49]

> (b) what is a reasonable fee may differ between lawyers, but the difference should be "narrow" in most cases; (c) ... time spent … is not the only factor; (d) It is not appropriate to (as an invariable rule) multiply the figure representing the expense of recorded time spent on the transaction by another figure to reflect other factors.

[124] There is no presumption or onus either way as to whether a lawyer's fee was fair and reasonable."[50] The process of determining a fair and reasonable fee is "an exercise in balanced judgment - not an arithmetical calculation".[51]

[125] For that reason, one lawyer may reach a "different conclusion[s]" from another lawyer "…as to what sum is fair and reasonable, although all should fall within a bracket which, in the vast majority of cases, will be narrow".[52]

[126] It is only when a fair and reasonable fee has been determined "can it be assessed whether the fee charged is sufficiently close to that amount to properly remain unchanged".[53] A particular lawyer's approach to billing may not necessarily "be a relevant consideration in determining whether a fee is fair and reasonable in all of the circumstances."[54]

Estimates

[127] If requested, r 9.4 requires that the lawyer "must provide" the client with "an estimate of fees, and inform the client promptly if it becomes apparent that the fee estimate is likely to be exceeded".[55]

[128] At the commencement of the client's matter, the lawyer must provide the client with information on the principal aspects of client service and client care including "the basis on which fees will be charged, when payment of fees is to be made, and whether the fee may be deducted from funds held in trust on behalf of the client…".[56]

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[49] *Hunstanton v Cambourne* LCRO 167/2009 (February 2010) at [22] referring to *Property and Reversionary Investment Corp Ltd v Secretary of State for the Environment* [1975] 2 All ER 436 (EWHC) at 441–442, and *Gallagher v Dobson* [1993] 3 NZLR 611 (HC) at 620. See also *Chean & Luvit Foods International Ltd v Kensington Swan* HC Auckland CIV 2006-404-1047, 7 June 2006 at [24] referred to in *AA v BK* LCRO 264/2012 (July 2013) at [57].
[50] *Hunstanton v Cambourne* at [63].
[51] *Property and Reversionary Investment Corporation Ltd*.
[52] *Hunstanton v Cambourne* at [62].
[53] *Hunstanton v Cambourne* at [64].
[54] *Hunstanton v Cambourne* at [15].
[55] Rule 9.4, fn 14: "See also rules 3.1, 3.3, and 3.4".
[56] Rule 3.4(a); r 3.4A(a) applies to barristers sole.

[129] If, as frequently occurs, the fee estimate is requested at that time, the estimate can accompany that information. An estimate can also be provided when requested in respect of particular attendances, as occurred in this Review.[57]

[130] Consistent with the consumer protection purposes of the Act, lawyers must take care in providing estimates.[58]

[131] As noted above, r 9.4 also requires that lawyers must inform the client "promptly" if it becomes apparent to the lawyer that the estimate is likely to be exceeded.[59]

(c) Discussion

Mr VW

[132] Mr VW claims Ms EX and Mr TY provided the group with the wrong advice, and overcharged the appellants. He seeks a refund of $29,950.18 representing his contribution towards the appeal fees including two years' interest.

[133] He claims Ms EX and Mr TY charged the appellants "nearly double" against the estimate of $35,000 to $45,000 plus GST for the appeal.

[134] In his view, having acted for the group in the initial High Court proceedings, Ms EX and Mr TY "already kn[ew] how complicated" the matter was, and "how much extra work" was required. [60]

Ms EX, Mr TY

[135] As noted earlier, Ms EX and Mr TY reject Mr VW's claim they did not act competently. They consider their fees were fair and reasonable. In their view, because the appeal "had not gone as well" as Mr VW hoped, he "wanted another chance" to argue the appeal issues.

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[57] *AQ v ZI* LCRO 105/2010 (February 2011) at [61] and [62]: when r 9.4 is "considered in conjunction with rule 7.2, it is clear" a request for a fee estimate "must be responded to in a timely manner".
[58] Section 3(b) of the Act; *BP v YF* LCRO 142/2010 (April 2011) at [68].
[59] *Fishguard v Walsall* LCRO 109/2009 (October 2009) at [20] – "[reflecting] the earlier practice guidelines of the Law Society's *Property Transactions: Practice Guidelines*…"; *AQ v ZI* LCRO 105/2010 (February 2011) at [75] and [76]; *Milnathort v Rhayader* LCRO 140/2009 (November 2009) at [21], [23]–[25]; *BP v YF* LCRO 142/2010 (April 2011) at [50]–[60], [67], [68].
[60] Mr SJ said the 30 October, and 30 November 2015 invoices should have been apportioned among the group, not just the appellants. He also queried apportionment of the 29 September 2015 invoice.

[136] They say the firm does "not provide quotes" for its legal services, and they "did not agree a fixed fee or provide a quote" for the appeal.

[137] Referring to their 23 September 2015 letter of engagement for the appeal, and 4 October 2015 "confirmation of instructions", Ms EX and Mr TY say (a) their fee estimate for the appeal of $35,000–$45,000 plus GST and disbursements was their "initial estimate based on [their] best efforts assessment at the time, with (b) "a rider" their fees would be charged "on a time and attendance basis" billed monthly, which they did.

[138] They say they kept the appellants "fully informed as the matter evolved", and the estimate was "fairly accurate to the end of the appeal hearing".

[139] However, they explain due to the "manner" in which the issues "arose incrementally" after the hearing resulting in the "additional costs", the "scope" of the legal work was "largely unknown and unpredictable", and it was not possible to provide "an adjusted estimate". They say this was "exacerbated by the often irrational and unmovable position" adopted by "some of the appellants", including Mr VW.

[140] Ms EX and Mr TY list as the reasons their total fees for the appeal of $75,462.52 plus GST and disbursements (total $86,781.90) exceeded their estimate were (a) the BC's attempt, which "ultimately failed", to "adduce further evidence"; (b) "a 10 page synopsis of submissions" required by the Court of Appeal; (c) the jurisdiction issue; and (d) "lengthy meetings and correspondence" with, and advising the appellants.

[141] They explain four of their invoices incorporated allowances (or reductions) of their recorded time.[61]

[142] They say their fees up to the appeal hearing, 16 June 2016, of $53,577.52 plus GST (total $61,614.15) exceeded their estimate by $8,577.52 plus GST (total $9,864.15), but were "[c]onsistent" with, and "within the range of [their] estimate".

[143] Ms EX and Mr TY explain except at times when "little was happening", the appellants were "invoiced monthly". For that reason, they submit the appellants would have been aware that due to the unforeseen issues, and the issues "raised" by the Court of Appeal, [the appellants] "would be charged" for additional work on a "time and attendance basis" as provided in the letter of engagement.

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[61] Invoices: 31 May 2016 for an allowance of $4,405 plus GST; 30 June 2016 for an allowance of $7,040 plus GST; 29 July 2016 for an allowance of $4,694 plus GST; 2 November 2016 for an allowance of $620 plus GST.

[144] They say Mr VW fully paid his share of the appeal costs, and apart from "seeking clarity on certain invoices and outstanding balances", and asking for a fee discount at the end, had not previously complained about fees.

Consideration

[145] Ms EX and Mr TY issued a total of 13 invoices concerning the appeal, and the related preparation of the s 74 scheme. Six invoices issued prior to the Court of Appeal hearing;[62] four invoices issued following the hearing but concerning the appeal;[63] and three further invoices concerning the s 74 scheme.[64]

[146] All 13 invoices are listed in the Committee's decision. In arriving at accumulated fees for the appeal of $75,462.52 plus GST (total, $86,781.00), Ms EX and Mr TY listed, in their response to the complaint, 10 of those invoices, but excluded those three invoices concerning the s 74 scheme.

Committee's analysis

[147] The Committee did not delegate the task of assessing of Ms EX's and Mr TY's fees to a cost assessor, but undertook its own assessment.

[148] Having reviewed Ms EX's and Mr TY's files and invoices, the Committee concluded the fees were fair and reasonable stating:

(a) five invoices, for fees of $35,225 plus GST and disbursements, were "caused by unforeseeable matters that arose during the appeal";[65]

(b) three invoices, for fees of $36,515 plus GST and disbursements, concerned amending the s 74 scheme; and

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[62] The six invoices up to the appeal hearing: (1) 30 October 2015 for $10,895 plus GST; (2) 30 November 2015 for $5,262.50 plus GST; (3) 22 December 2015 for $3,080 plus GST; (4) 29 February 2016 for $5,140 plus GST; (5) 29 April 2016 for $6,000 plus GST; (6) 31 May 2016 for $15,000 plus GST.

[63] The four invoices after the appeal hearing: (1) 30 June 2016 for $9,000 plus GST; (2) 29 July 2016 for $16,000 plus GST; (3) 31 October 2016 for $3,385 plus GST; (4) 28 February 2017 for $1,200 plus GST.

[64] The three invoices for the s74 scheme: (1) 2 November 2016 for $7,000 plus GST; (2) 1 December 2016 for $13,630 plus GST; (3) 28 February 2017 for $15,885 plus GST: total, $36,515 plus GST.

[65] The five invoices for unforeseeable matters: (1) 29 February 2016 for $5,140 plus GST and disbursements; (2) 30 June 2016 for $9,000 plus GST and disbursements; (3) 29 July 2016 for $16,000 plus GST and disbursements; (4) 31 October 2016 for $3,885 plus GST and disbursements; and (5) 28 February 2017 for $1,200 plus GST and disbursements: total, $35,225 plus GST.

(c) the remaining five invoices for fees of $40,237.50 plus GST and disbursements, were within the fee estimate. [66]

[149] In arriving at that conclusion the Committee took into account seven of the thirteen fee factors in r 9.1.

Rule 9.1(a) - time and labour expended

[150] The Committee refers to "significant time and labour [being] expended", for which details of attendances are contained in narrations on the invoices, but does not state the actual hours Ms EX and Mr TY spent on the appeal, or their applicable hourly charge out rates. There is no reference to time records, or work in progress printouts produced for consideration.

[151] I observe that Ms EX's and Mr TY's hourly rates were not specified in their (a) 10 February 2015 letter of engagement, or terms of engagement, concerning the High Court matter, or (b) 23 September 2015 letter which first contained their estimate for the appeal, or (c) 4 October 2015 letter which confirmed that estimate accompanied by their terms of engagement.

[152] Each invoice contains a narration of relevant attendances with values attributed. However, it appears only four invoices contained the dates of the attendances, and corresponding units of time.[67]

Rule 9.1(b) – skill, specialised knowledge, and responsibility required

[153] The Committee says Ms EX and Mr TY possessed "the appropriate level of knowledge to handle the appeal and negotiate amendment to the scheme", but again does not relate this to Ms EX's and Mr TY's experience and expertise in resolution of weathertight disputes which it could be expected Ms EX and Mr TY would consider when setting their hourly charge out rates.

Rule 9.1(c) – importance of the matter to the client and the results achieved

[154] The Committee's comment that the appellants "appeared determined to succeed" does not explain why the Committee considered this factor deserved a

[66] The five remaining invoices within the estimate: (1) 30 October 2015 for $10,895 plus GST; (2) 30 November 2015 for $5,262.50 plus GST; (3) 22 December 2015 for $3,080 plus GST; (4) 29 April 2016 for $6,000 plus GST; (5) 31 May 2016 for $15,000 plus GST: total, $40,237.50 plus GST.

[67] Invoices: 30 June 2016; 29 July 2016; 31 October 2016; 29 February 2017. Assuming, as it appears, there were six units per hour, the hourly rate could be calculated.

weighting in assessing the reasonableness of the fees. In particular, in the context of dismissal of the appeal by the Court of Appeal for want of jurisdiction.

Rule 9.1(d) – urgency

[155] The Committee states there was "some urgency" in negotiating an amendment to the s 74 scheme "due to the deadline set" by the High Court.

[156] However, it is not clear whether the Committee is referring to (a) the statement by the High Court in its interim judgment that the Court "anticipat[ed]" the parties would "come back to the Court with a scheme which all support", and request consent orders, or, (b) to enable the appeal from that judgment to proceed, the timetable of 14 days imposed by the Court of Appeal in its 24 June 2016 minute for the parties to obtain consent orders from the High Court.

Rule 9.1(f) – complexity of the matter and the difficulty or novelty of the questions involved

[157] Apart from referring to this factor, the Committee does not provide an explanation why this factor should receive a weighting in its consideration.

Rule 9.1(g) – experience, reputation and ability of the lawyer

[158] The Committee refers to Ms EX, and Mr TY, being a partner, and associate respectively in the firm each having considerable experience. It could, however, be expected the Committee would say, for the applicants' benefit, whether this factor, as with the "skill, specialised knowledge" factor, was similarly reflected or taken into account in their respective hourly charge out rates.

Rule 9.1(m) - fee customarily charged in the market and locality for similar legal services

[159] Without further elaboration, the Committee states the fees were "similar to those customarily charged".

Rule 9.1(j) – any quote or estimate of fees given by the lawyer

[160] The Committee stated it was "satisfied" with Ms EX's and Mr TY's explanation that (a) "unexpected matters which arose during the appeal" accounted for their fee estimate of $35,000 to $45,000 being exceeded, and (b) their "remaining fees" of $40,237.50 plus GST and disbursements in five invoices were "within the estimate".[68]

[68] See above.

[161] However, the Committee did not discuss whether or not Ms EX, and Mr TY, as required by r 9.4, "promptly" informed the appellants that the estimate was "likely to be exceeded".

Cost assessors – procedures manual

[162] I make the observation it would have been of assistance had the Committee included in its decision, or referred to, an analysis of Ms EX's and Mr TY's fees as recommended in the Lawyers Complaints Service's Procedures Manual (the Procedures Manual).[69]

[163] Where a Standards Committee, as the Committee did, elects to carry out its own assessment, rather than delegate that task to a cost assessor, it is nonetheless incumbent on the Committee to carry out an analysis in the same manner as would a costs assessor. In that regard, the Committee may delegate the task to a member or members of the Committee who would prepare a report for the Committee to consider.[70]

[164] The Procedures Manual includes helpful "Notes for Costs Assessors" which state that a costs assessor is expected to carry out an analysis of the invoice(s) including the lawyer's file, and prepare a report for the Committee. The assessor is requested to provide an opinion as to a fee which is fair and reasonable or a range in which a fee would be considered fair and reasonable, and in doing so meet with the parties.[71]

[165] The notes also recommend a four stage approach to the analysis.[72] A reporting format is provided to assist assessors structure their research, analyses, and conclusions. Importantly, the specimen report recommends that before undertaking the analysis the assessor:[73]

> … consider whether any comment need to be made on: adequacy of time recording; any duplication of attendances; any movement in hourly rates during the course of the transaction and whether they had been communicated; any calculation errors; any comment on the time recording system (if the firm does not have a computerised time recording system); any comment arising out of cross checking attendances to the time recorded; whether the fees have been paid in whole or in part …

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[69] Version 5, effective 20 January 2017. A similar recommendation was available at the time the Committee considered the complaint.
[70] Law Society's *Practice Note concerning the Functions and Operations of Lawyers Standards Committees* at [10.3], made under reg 28 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008.
[71] Procedures Manual at p150.
[72] At p152.
[73] At p146.

Conclusion

[166] It is appreciated that the consideration and analysis by a Standards Committee of a large file in respect of a complex matter, be it litigation or commercial, where significant fees have been charged by the lawyer(s) concerned, can be demanding.

[167] Nevertheless, in a complex litigation matter such as this involving preparation for and appearances by Ms EX and Mr TY in both the High Court, and Court of Appeal in respect of which total fees, according to my calculation, of $111,707.50 plus GST were charged, it is reasonable to expect the Committee to provide, especially for the complainant's benefit, a full explanation why the fee factors identified deserved a weighting.

[168] From my own analysis, I am not persuaded that without the further explanation I have referred to, the Committee's analysis is sufficiently complete for me to carry out a meaningful review of the Committee's decision as to whether Ms EX's and Mr TY's fees were fair and reasonable.

[169] For these reasons, I have decided the proper and appropriate course is for me to return this aspect of Mr VW's complaint for reconsideration by another Standards Committee.

Decision

[170] For the above reasons, pursuant to s 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is:

(a) Confirmed as to the Committee's finding to take no further action concerning Mr VW's allegation that Ms EX and Mr TY failed to act competently.

(b) Reversed as to the finding to take no further action concerning Mr VW's allegation that Ms EX's, and Mr TY's fees charged to him and his co-appellants, and other members of the group, as applicable, were not fair and reasonable.

Direction – reconsideration and determination

[171] Pursuant to s 209(1)(a) of the Act I direct that Mr VW's complaint Ms EX's and Mr TY's fees charged to him and his co-appellants, and other members of the group, were not fair and reasonable be reconsidered and determined by a Standards Committee other than the [Area] Standards Committee [X].

[172] In making that direction the Standards Committee to whom Mr VW's complaint about Ms EX's and Mr TY's fees is referred, is also directed to consider whether Ms EX and Mr TY complied with their requirements under r 9.4, in particular, to "promptly" advise the group, and appellants, as applicable, if their fee estimate was "likely to be exceeded", and, as required by r 9, and r 9.1(j), to have regard to their fee estimate.

Anonymised publication

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

DATED this 03rd day of May 2021

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B A Galloway
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 H VW, as the Applicant
Ms EX and Mr TY as the Respondent
[Redacted] as related person
General Standards Committee 3
New Zealand Law Society